Index.

Pages

PREFACE ..... 1 - 2

STATEMENT OF FACTS ..... 2 - 4

SPECIFICATIONS OF ERROR ..... 4 - 12

FIRST POINT.

That there is a divergence among the cases as to whether a charter-party which requires the charterer to furnish supplies to the ship, withdraws from the master the power to order supplies for which the materialman, with knowledge of the terms of the charter-party, may assert a lien ..... 13 - 52

SECOND POINT.

That the ship-owner's immunity from the necessity of paying the ship's bills does not relieve his ship from a like necessity ..... 52 - 53

THIRD POINT.

That the provision of the charter-party requiring the charterer to hold the owner harmless from any lien asserted for supplies furnished the ship, is tantamount to a declaration by the owner that such liens may be asserted ..... 54 - 79

FOURTH POINT.

That the law applicable to this case was not altered by the Act of June 23, 1910 (36 Stat. L. 604). (This conclusion accords with appellant's position.) ..... 79 - 97

List of Cases.

Pages

Algonquin, The, 88 Fed. 318, 319 63
Alvira, The, 63 Fed. 144 ..... 14, 23, 25
Aurora, The, 194 Fed. 559 ..... 81, 88

Barreda v. Silsbee, 21 How. 146 79
Burton, The, 84 Fed. 998, 999 63

City of Milford, The, 199 Fed. 956 ..... 14, 36, 55, 63, 68, 74
Columbus, The, 5 Sawy. 487; Fed. Cas. 3044 ..... 13, 14, 63
Columbus Match Co. v. Robins, 148 U. S. 266 54
Cumberland, The, 30 Fed. 449 ..... 13, 18, 63

Dixie, The, 236 Fed. 607 ..... 81, 88
Dredge A., The, 217 Fed. 617 ..... 80, 86, 88

Ellen Holgate, The, 30 Fed. 125 ..... 13, 19, 63

Fields v. United States, 205 U. S. 292 54
Forsythe v. Hammond, 166 U. S. 504 54
Francis J. O'Hara, Jr., The, 229 Fed. 312 ..... 2, 14, 41, 57, 63

Gen. J. A. Dumont, The, 158 Fed. 312 ..... 55, 74
George Farwell, The, 103 Fed. 852 ..... 14, 29
Golden Rod, The, 151 Fed. 6 ..... 55, 74
Grady, H. C. The, 87 Fed. 232 ..... 14, 25, 63, 78

Ha Ha, The, 195 Fed. 1013 ..... 14, 41
Harvard Law Review, 345 52
Havana, The, 87 Fed. 487, 488 88

International, The, 30 Fed. 375 ..... 13, 19
Iris, The, 100 Fed. 104 ..... 49, 53

J. Doherty, The, 207 Fed. 997 ..... 14, 40, 61, 63, 78
James T. Furber, The, 157 Fed. 126 ..... 81, 88
James v. Brophy, 71 Fed. 310 ..... 78, 79

Kate, The, 164 U. S. 458 ..... 14, 22, 63, 89
Kate, The, 56 Fed. 614 21

Lottawanna, The, 21 Wall. 558 ..... 81, 88

Malloa, The, 214 Fed. 308 ..... 14, 41
Mary A. Tryon, The, 93 Fed 220, 221 68

Pages

New Brunswick, The, 129 Fed. 893..... 48, 61
North Pacific, The, 100 Fed. 490.....14, 30, 63
Northwestern Fuel Co. v. Dunkley-Williams Co., 174 Fed. 121 .....14, 34, 36, 55, 71

Oceana, The, 233 Fed. 139.....14, 43, 95
Oceana, The, 244 Fed. 80.....14, 51, 55
O. H. Vessels, The, 183 Fed. 561, 562-3..... 63

Philadelphia, The, 75 Fed. 684..... 48
Pratt v. Reed, 19 How. 359..... 81, 87

Raymond v. Tyson, 17 How. 146..... 79
Robert Dollar, The, 115 Fed. 218..... 14, 28
Rosalie, The, 75 Fed. 29..... 14, 24

Samuel Marshall, The, 54 Fed. 396.....13, 20, 63
Samuel Marshall, The, 49 Fed. 754..... 13, 19
Sarah Cullen, The, 45 Fed. 511.....53, 59, 63
Secret, The, 15 Fed. 480..... 13, 16
Sinaloa, The, 209 Fed. 287..... 80, 85
S. M. Whipple, The, 14 Fed. 354.....13, 16, 63
Stephenson v. The Francis, 21 Fed. 715..... 13, 16
Surprise, The, 34 C. C. A. 313.....46, 47, 49, 50, 60, 73

Taylor v. Weir, 110 Fed. 1005..... 88
Thomas W. Rodgers, The, 197 Fed. 772..... 14, 51
Tillie A., The, 84 Fed. 684, 685..... 63

Underwriter, The, 119 Fed. 713.....1, 5, 14, 31, 46, 48, 63

Valencia, The, 165 U. S. 264.....14,22, 84
Vigilant, The, 151 Fed. 747.....14, 32, 33

William Cook, The, 12 Fed. 919.....13, 15, 63

Yankee, The, 233 Fed. 919.....14, 44, 80, 86, 96
Yankee Blade, The, 19 How. 82..... ..... 81, 88

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No.

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,

Appellant,

vs.

J. C. RUDBACH,

Appellee.

BRIEF FOR APPELLANT.

Preface.

The precise point involved in this controversy was decided by Judge Lowell in one of the most scholarly opinions available on a maritime question (*The Underwriter*, 119 Fed. 713, 759-764). Consequently, unless the law applicable to the facts of this case was altered by the Act of June 23, 1910, we respectfully submit that the decision should have

been reversed. That the law was not so altered appears conclusively from *The Francis J. O'Hara, Jr.,* 229 Fed. 312, and it was so held by the Circuit Court of Appeals in this case.

Statement.

We cannot better present a concrete abstract or statement of this case than to quote the opening portion of the opinion of the learned District Judge who tried the cause. Judge Dooling said:

> "Libelant furnished supplies at various times to the steamer 'South Coast' in the harbor of San Pedro, each time on the order of the person then her master. The vessel was, during this period, being operated by one Levick under a charter from the owners, which charter was also in the nature of a conditional bill of sale, or option to purchase. Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ship's account, and had also been advised that Levick and Oliver would pay the bills. To this he replied that it was immaterial to him who paid the bills, but that he would not sell any goods to the ship in any other way than by charging them to the ship and her owners and if they did not want it that way he would not deliver any goods. This was stated by him to one Mills, who first informed him that Levick was operating the ship, and who had been directed by the owners to give him warning not to sell on the credit of the ship. He was also warned by Mr. Sooy one of the owners not to deliver any goods on the credit of the ship. So that if

the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given.

"The charter in question contains the following provisions:

'Fifth:—It is understood that this charter is a charter of the bare vessel, and that the party of the second part (Levick) shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature; pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines or Government fines, pilotages, over time of crew; agencies, commissions, consular charges, dry docking, painting of the hull of said vessel, furnishing all lines and slings, and pay all charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise, that may be incurred in or about the use of said vessel during the term of this charter'.

'Tenth:—Said party of the second part further covenants * * * that if said payments (charter hire) be not made, then at the option of the first party said vessel will be delivered to the said party of the first part * * * free from all liens and claims of every kind or description whatsoever during the term of this charter-party, except the lien for any salvage services that may be rendered to said vessel, and that he, the said party of the second part, will hold and save harmless the said party of the second (first) part from all liens, claims or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter-party, except any claim for salvage services

that may be rendered to said vessel; and further, will save said party of the first part harmless from all liens, losses, damages, costs or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith' ". (Transcript of Record, pp. 121 to 123.)

Specifications of Error.

The Circuit Court of Appeals in affirming the District Court's decree for the libelant, held:

1st. That there is a divergence among the cases as to whether a charter-party which requires the charterer to furnish supplies to the ship, withdraws from the master the power to order supplies for which the material-man, with knowledge of the terms of the charter-party, may assert a lien.

2nd. That the ship-owner's immunity from the necessity of paying the ship's bills does not relieve his ship from a like necessity.

3rd. That the provision of the charter-party requiring the charterer to hold the owner harmless from any lien asserted for supplies furnished the ship, is tantamount to a declaration by the owner that such liens may be asserted.

4th. That the law applicable to this case was not altered by the Act of June 23, 1910 (36 Stat. L. 604). (This conclusion accords with petitioner's position.)

The conclusions reached by Judge Lowell in *The Underwriter* (referred to in our "preface") are quite the reverse of those of the trial court and Circuit Court of Appeals in this case. Following a profound exposition of the history of maritime liens for supplies and repairs, Judge Lowell reflects upon the facts of his case, the principles evolved from his treatise and states his conclusions as follows (119 Fed. 759-764. The italics are our own):—

> "It remains to consider the case at bar in the light of the results already reached. Did this owner assent to the lien in the case? Did he lead the materialman to believe in his assent? Ought the materialman to have known that the owner dissented? All the circumstances by which the lien is ordinarily created or from which it is ordinarily presumed are here present,—the foreign port, the order of the master, the absence of the owner, the need of supplies if the vessel is to navigate, the necessity of pledging the credit of the vessel if the supplies are to be procured. To this the defense is: Want of authority in the master, known to the materialman, to create the lien upon the vessel. What is meant by the master's want of authority in a matter like this? No law ever provided baldly that the repairer of a vessel should always have a lien. My vessel lies at a wharf out of repair, and she is repaired by a mere trespasser. In general he has no lien under any system of law. The repairs must be ordered or authorized by some one in authority, and the master is ordinarily such a person either at home or abroad; that is to say, the master ordinarily has authority to license the act of repairing. If authorized by him it is no longer a trespass. If the owner has given the master express authority to con-

tract for repairs or supplies, the owner is bound personally. If the repairs are within the scope of the authority which the maritime law attributes to the master, and that authority has not been specially limited, the owner or the charterer, that person of whom the master is agent, is personally bound to pay for the repairs. All this is a development of the ordinary law of agency. By English law it seems that the owner is bound, even if the advances for repairs, etc., are made in a domestic port. Abb. Shipp. (7th Am. Ed.), 186; Arthur v. Barton, 5 Mees. & W. 138; Johns v. Simons, 2 Q. B. 425; The Lochiel, 2 W. Rob. Adm. 45. See Speerman v. Degrave, 2 Vern. 643. The owner is bound by the act of his authorized agent, as if he had ordered the repairs himself. If the owner is actually present in the port, something more than the ordinary implied authority of the master may be necessary to bind the owner for repairs, even if not for supplies. By a peculiarity of the maritime law the master also is bound individually, but this peculiarity need not concern us here. *Whatever be the authority ordinarily given to a master, if in the particular case he has no authority to bind his principal, and if the materialman knows this want of authority, the owner or principal cannot be held.* This also is the familiar law of agency. So, if the master has no authority to permit the materialman to make the repairs, and the materialman, who makes them on the master's order, knows this want of authority, it is hard to see how he can justify his trespass. If he knows that the master is forbidden to create a debt binding upon the owner, he cannot hold the owner. If he knows that the master is forbidden to permit the creation of a lien on the ship, he cannot claim a lien. Put the case in another way: If the materialman knows that the master is forbidden to repair, even in a foreign port, it would seem that he cannot proceed

against either owner or vessel. If he knows that the master is permitted to repair, but only upon the condition that the repairs are chargeable neither to the owner nor to the vessel, then, if he makes the repairs on the order of the master, and without objection, it would seem that he impliedly waives his lien upon the vessel. See Emerigon, in Hall's Maritime Loans, 89, 90. It is true that the maritime law and its codes give great power to the master. But these powers must be subject to enlargement and diminution by agreement between owner and master. In general, the latter cannot hold the former by the general rules of maritime law against an express agreement duly entered into between them, and it is hard to see how he can bind him in contravention of the agreement to a third person who has knowledge of its terms. We need not here discuss the statutory lien. The terms of the statute may expressly give to the master authority to create a lien, whether the owner authorizes it or not. See The Kate, 164 U. S. 458, 470; The S. M. Whipple (D. C.) 14 Fed. 354.

The mere fact that a vessel is known to be under charter does not deprive of his lien one who, in a foreign port, furnishes it with supplies on the order of the master. The George Dumois, 15 C. C. A. 675, 68 Fed. 926; The Philadelphia, 21 C. C. A. 501, 75 Fed. 684. *But if a charter or other contract limits the authority of the master in the matter of buying coal, and forbids him to buy it except upon the personal credit of the charterers only (and perhaps on his own personal credit) and if the libelant has notice of this limitation, it would seem that the lien either does not arise or is impliedly waived.* In The Kate, 164 U. S. 458, Mr. Justice Harlan said: (Here follows a quotation from the cited case).

The learned Justice also quoted from an opinion rendered by Judge Sprague in this

court in The Sarah Starr, 1 Spr. 453, 455, Fed. Cas. No. 12,354, where it was said: (Here follows quotation subsequently appearing in our brief).

See The Columbus, 5 Sawy. 487, Fed. Cas. No. 3,044; Swift v. The Albus, Fed. Cas. No. 13,694; The S. M. Whipple (D. C.) 14 Fed. 354; The Alvira (D. C.) 63 Fed. 144.

In the Bombay (C. C.) 38 Fed. 863; Id. (D. C.) 38 Fed. 512 it is not stated if the libelants knew that the vessel was under charter, and it is said expressly that they had no notice of its provisions. By the French law it seems that the vessel is not bound for supplies ordered by the charterer unless the supplies are needed for the ship, apart from the special needs of the charterer, and unless the owner, if present, would have ordered them. Desj. I, 256.

One argument in support of the Master's authority to bind the vessel, even when expressly forbidden to do so, should not be overlooked. Suppose the charter provides that the owner shall pay the wages of the crew. To put this charge upon the charterer is not uncommon. Suppose the crew to have knowledge that the charter forbids the charterer to create a lien for wages, it may be asked if the crew would lose their lien. In the case put they would have that knowledge of the master's limitation of authority which the materialmen are held to have had in the case at bar. Why should they fare any better? It is probable that the seamen's lien on the vessel would exist even in the case put,—that is to say, even though they knew that the master, in permitting it to arise, was guilty of bad faith. The seamen would be protected, however, not by the logical result of admitted principles of general law, but by reason of the favor shown to them in a court of admiralty. The wages of seamen are secured upon the vessel in many jurisdictions by a

statute which admits of no exception. *Taking it as established, then, that the vessel is not bound even for necessary supplies furnished in a foreign port on the master's order, provided the materialman knows that the master is forbidden to create a lien for the purpose,* we next consider if the master's authority was so limited in this case. The limitation here contended for by the claimant is found in the charter party, whose material parts are as follows:

(2) The owner shall provide and pay for all the provisions, water, wages, and consular shipping and discharging fees of the captain, officers, engineers, firemen, and crew of said tug; shall pay for the insurance of the same; also for all ship, cabin, engineroom, and deck stores; and maintain said tugs in a thoroughly efficient state in hull and machinery for and during the service, and including the necessary hawsers and lines for mooring and towing.

(3) The charterer shall provide and pay for all the coals, port charges, pilotages, agencies, and commissions, and all other charges whatsoever, except those before stated, and shall likewise, in case the owner deems it necessary to insure said tugs, or any of them, against war risks, pay the additional cost of the premium for such insurance.

The charterer shall accept and pay for all coals in the tugs' bunkers on delivery, and the owner shall, on the expiration of this charter party, pay for all coal left in the bunkers, each at the current market prices at the port of Boston when said tugs are delivered to them.

(6) The captains of said tugs, although appointed by the owner, shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, and the charterer hereby agrees to indemnify the owner from all consequences or liabilities that

may arise from any irregularities in ship's papers, of from the captains signing bills of lading, or otherwise complying with the charterer's directions.

The court has to consider if this language is (1) a limitation on the authority of the captain, or (2) merely a contract made by the charterer with the owner that the former will pay for supplies in the first instance, and, in case this is not done for any reason, will reimburse the owner for supplies paid for by the latter. The language of the clauses might not unreasonably bear either construction. On general principles there is much to be said in support of the contention that a clause in a charter like that above quoted, providing that the charterer shall supply the vessel with coal, is intended merely as a contract between charterer and owner, and does not limit the general authority of the master to order coal for the vessel upon the vessel's credit in a foreign port. In The Kate, above cited, the provisions of the charter were much like those in this case, and the supreme court said at page 465, 164 U. S. page 138, 17 Sup. Ct. and page 512, 41 L. Ed. (Here follows quotation subsequently appearing in our brief).

There was a like charter in The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, and the court said at page 270, 165 U. S. page 325, 17 Sup. Ct., and page 710, 41 L. Ed.:

'Although the libelants were not aware of the existence of the charter party under which the Valencia was employed, it must be assumed, upon the facts certified, that by reasonable diligence they could have ascertained that the New York Steamship Company did not own the vessel, but used it under a charter party providing that the charterer should pay for all needed coal. The libelants knew that the steamship company had an office in the city of New

York. They did business with them at that office, and could easily have ascertained the ownership of the vessel and the relation of the steamship company to the owners. They were put upon inquiry, but they chose to shut their eyes and make no inquiry touching these matters, or in reference to the solvency or credit of that company.'

See Beinecke v. The Secret (D. C.) 3 Fed. 665, quoted with approval by the supreme court in the last named case; The Cumberland (D. C.) 30 Fed. 449, 455; The William Cook (D. C.) 12 Fed. 919; Neill v. The Francis (D. C.) 21 Fed. 921; The Solveig, 43 C. C. A. 250, 103 Fed. 322; The Stroma (D. C.) 41 Fed. 599; The Priate (D. C.) 32 Fed. 486.

In other cases it was assumed that, if the materialman had had knowledge of the existence of a charter like that in this case, he would have had no lien, although as no knowledge on his part was established, the lien was allowed. The North Pacific, 40 C. C. A. 510, 100 Fed. 490; Norwegian S. S. Co. v. Washington, 6 C. C. A. 313, 57 Fed. 224; The Ellen Holgate (D. C.) 30 Fed. 125. These cases construe the language used in this charter to forbid the master to pledge the credit of the vessel for the supplies he orders. Many of these cases, and others heretofore cited, also hold that the materialman is affected by the limitations of the charter if he has notice of them. There is much authority for the proposition that this charter, if brought to the notice of the materialman, will prevent him from getting a lien. It is true that there is authority upon the other side, and that the opinions of the supreme court just cited are not quite explicit. In the City of New York, Fed. Cas. No. 2,758, the lien was upheld in the case of a charter like this. The vessel was in a really distant port, however, and was in such peril that the limitation imposed on the master's authority by the char-

ter may have been treated as inapplicable within the intent of the parties. The opinion is short. See The Wm. Cook (D. C.) 12 Fed. 919, 920. In The Lucia B. Ives, Fed. Cas. No. 8,590, the lien was upheld, but whether in reliance on the express terms of the statute or upon a doubt as to the meaning of the charter is not clear. In The Monsoon, Fed. Cas. No. 9,716, decided by Judge Sprague, in which that distinguished Judge upheld a lien upon a chartered vessel, it is doubtful if the decision was rested upon a supposed inability of the owner to limit the master's authority, or upon a construction of the charter in question. If the former, the case stands substantially alone; if the latter, it is opposed to the great weight of authority. See The H. B. Foster, 3 Ware, 165, Fed. Cas. No. 6,291; Rozo v. The Neversink, Fed. Cas. No. 12,079; The India (D. C.) 14 Fed. 476; Id. (C. C.) 16 Fed. 262. The language of some of the opinions last cited is not clear, but the learned Judges who delivered them did not mean to hold that a materialman could claim a lien for supplies furnished a vessel where he knew that the person ordering the supplies was expressly forbidden to permit the vessel to become bound for them.

That a chartered vessel is ordinarily bound for the price of supplies ordered for her use in a foreign port by the master was expressly decided in this circuit in the case of The Philadelphia, and this is the law where the charter is silent upon the subject. *Where, however, the charter limitation is that found in this case, and where the coal is ordered, not in a port of distress, where it may reasonably be supposed that the further prosecution of the voyage is for the interest of the owner as well as for that of the charterer, I am of opinion that no lien exists.*"

I.

The first proposition announced by the court is the following:

THERE IS A DIVERGENCE AMONG THE CASES AS TO WHETHER A CHARTER-PARTY WHICH REQUIRES THE CHARTERER TO FURNISH SUPPLIES TO THE SHIP, WITHDRAWS FROM THE MASTER THE POWER TO ORDER SUPPLIES FOR WHICH THE MATERIAL-MAN, WITH KNOWLEDGE OF THE TERMS OF THE CHARTER-PARTY, MAY ASSERT A LIEN.

We respectfully submit that the divergence arises from the decision in this case and that the court cites no authority to support its conclusion.

THERE ARE NUMBERLESS AUTHORITIES WHICH SUPPORT THE ANTITHESIS OF THE CONCLUSION WHICH WAS REACHED BY THE CIRCUIT COURT OF APPEALS.

Some of these authorities follow:

The Columbus, (1879) 5 Sawy. 487; Fed. Cas. 3044;

The William Cook, (1882) 12 Fed. 919;

The S. M. Whipple, (1881) 14 Fed. 354;

The Secret, (1879) 15 Fed. 480;

Stephenson v. The Francis, (1884) 21 Fed. 715, 725-726;

The Cumberland (1886) 30 Fed. 449, 455;

The Ellen Holgate, (1887) 30 Fed. 125;

The International, (1887) 30 Fed. 375;

The Samuel Marshall, (1892) 49 Fed. 754, 760;

The Samuel Marshall, (1893) 54 Fed. 396, 398-399, 404;

The Kate, (1896) 164 U. S. 458;
The Valencia, (1897) 165 U. S. 264, 272-3;
The Alvira, (1894) 63 Fed. 144, 156, 160;
The Rosalie, (1895) 75 Fed. 29;
The H. C. Grady, (1898) 87 Fed. 232;
The Robert Dollar, (1902) 115 Fed. 218, 219-220;
The North Pacific, (1900) 100 Fed. 490,
The George Farwell, (1900) 103 Fed. 852;
The Underwriter, (1902) 119 Fed. 713;
The Vigilant, (1907) 151 Fed. 747, 751;
Northwestern Fuel Co. v. Dunkley-Williams Co., (1909) 174 Fed. 121;
The City of Milford, (1912) 199 Fed. 956;
The Thomas W. Rodgers, (1912) 197 Fed. 772;
The Ha Ha, (1912) 195 Fed. 1013;
The J. Doherty, (1913) 207 Fed. 997;
The Malloa, (1914) 214 Fed. 308;
The Francis J. O'Hara, Jr., (1915) 229 Fed. 312;
The Oceana, (1916) 233 Fed. 139;
The Yankee, (1916) 233 Fed. 919, 925-6;
The Oceana, (1917) 244 Fed. 80.

In *The Columbus*, (1879) 5 Sawy. 487; Fed. Cas. 3044, Judge Hoffman said:

> "For these reasons I am of opinion that the lien conferred by the statute is essentially a maritime lien, that it is subject to the same rules and to be tested by the same principles as those which apply to liens for supplies furnished to a foreign vessel, and that it was not

intended to confer upon a 'master, agent or consignee' an irrevocable power to hypothecate the vessel for supplies in the port where the owner resides, contrary to his instructions, and in spite of his protest, and that the material-man, who, with full notice of the circumstances, furnishes supplies to the master, must look to him personally, and not to the owner or the vessel for repayment".

In *The William Cook,* (1882) 12 Fed. 919, it was held:

"The libelant is in this case precluded from alleging that the coal was furnished upon the credit of the vessel. The evidence is clear and convincing that he had express notice, from the owners, of the charter-party and of its terms, and that neither they nor the vessel should be held for supplies, and that thereupon the libelant arranged specifically with Pollock, the charterer, for weekly payments. Upon such facts he could not lawfully charge the ship, and the coal must be held to have been supplied upon Pollock's personal credit. Beinecke v. The Secret, 3 Fed. Rep. 665; The Norman, 6 Fed. Rep. 406. After such notice it would be a gross violation of justice and equity to permit a material-man to continue to furnish supplies and charge the ship therefor, which would be virtually at the expense of the owners, who had no interest in the supplies and had carefully used all possible means of avoiding liability. The Columbus, 5 Sawy. 487. There are doubtless circumstances in which the known obligation of the charterer to pay for supplies would not prevent a lien on the ship, as where a vessel is in a foreign port in distress, with no means of obtaining supplies necessary to complete her voyage and reach the hands of her owners, and where express notice not to credit the ship had not been given. In such cases the

> interests of her owners and the necessities of the case might raise an implied authority in the master from the owners to obtain necessary supplies on the credit of the ship, notwithstanding the charterer's known obligation to pay for them. The Monsoon, 1 Spr. 37; The City of New York, 3 Blatchf. 187, 188".

In *The S. M. Whipple,* (1881) 14 Fed. 354, it was held:

> "Where the owner, who charters a vessel to third parties and under the terms of the charter-party appoints the master for the term of the contract, seeks to displace the lien given by statute for materials and supplies furnished the vessel by setting up a private agreement by which the master was deprived of the authority to create liens on the vessel, he should show by clear proof that explicit and unequivocal notice of the facts was given to persons dealing with the vessel."

The Secret, (1879) 15 Fed. 480.,

Blatchford, Circuit Judge, said:

> "Although The Secret was in a foreign port, and although Murray, Ferris & Co. when ordering the coal, stated to Russell & Hicks that it was for The Secret, yet the circumstances were such that the libelant's agents, Russell & Hicks, were put on inquiry, from which they could easily have learned this, notwithstanding the above facts. Murray, Ferris & Co. were the charterers of the vessel, and had no power to bind the claimant or the vessel to pay for coal bought for her. If they had used due diligence they would have ascertained such want of power."

Stephenson v. The Francis, (1884) 21 Fed. 715, 725-726, where the court says:

"Again, the ship in this case was under no necessity of proceeding upon her new trips, for which this coal was furnished. Savage, by his charter, had no right to pursue her ordinary navigation at the ship's expense. If he could not fit her out for her trips without resorting to her own credit, having no right to use that credit for ordinary supplies, it was his duty to surrender her, or, at least, not to run her until he could arrange to do so without a violation of his agreement with the owner. There was no commercial necessity that she should depart upon this trip; and the general owner had no interest that she should be navigated except according to the terms of the charter. In this respect the case is wholly different from that of The City of New York, 3 Blatchf. 189, where the vessel was in a port of distress, on an unfinished voyage, and where the interest of the ship and of her general owner also required the supplies. Broadly considered, therefore, the first requisite for a lien, viz., a necessity for the supplies did not exist. Had Savage, being under no necessity to continue the vessel's trips, and not being in any port of distress, expressly contracted for ordinary supplies on the ship's credit, this would have been a clear wrong to the general owner, and a violation of the terms of the charter, because the stipulation of the charter was for the very purpose of preventing this. The language of the supreme court in the case of Gracie v. Palmer, 8 Wheat. 605, 639, would in that case seem to be applicable. 'The charterer', the court says, 'has contracted with the shipper (here the material man) to do an act which he could not perform without violating his own contract with the ship's owner; and he must therefore be considered as having entered into a contract subordinate in its nature to that previously existing between the owner and charterer.' And this was approved in The Freeman v.

Buckingham, 18 How. 182. In the case last cited, Curtis, J., also expressly limits the effect of the ordinary maritime usages to 'contracts * * * entered into with a person who has no notice of any restriction.' Page 490. But, in the present case, Savage clearly had no intention of violating the charter, or of obtaining supplies on the ship's credit, and the question of his *power* does not, therefore, properly arise in this case. The notice, moreover, given by the captain to the libelants, was of itself one of the terms upon which the coal was supplied. The captain is the person who in a foreign port specially represents the ship and all interests combined. When he gives notice that the ship is not to be bound for supplies, that becomes one of the terms on which any supplies subsequently delivered must be deemed furnished, and which estop the material-man from asserting the contrary. Considering the knowledge of the charter that the libelants possessed, as well as this notice from the captain, and the fact that the supplies were for the ship's ordinary use, and not under the stress of any maritime necessity, or in a port of distress, the obligations of good faith, without the observance of which no lien is sustained, estop the libelants from asserting any credit to the ship, or holding her answerable." (Citing cases.)

The Cumberland, (1886) 30 Fed. 449, 455, where the court said:

"The same conclusion would follow in the case of Philbrick, who furnished coal to the amount of $900 during November, December and January, upon the application of the masters, were it not for one circumstance. He says he had no knowledge of how the boat was being run; that the coal was furnished upon the credit of the boat, and he would not have furnished it upon the credit of the owners or

McKay; but he admits that on the twentieth December he met a party who claimed to be her owner, and informed him of the charter and its terms. This I consider sufficient to put him upon his guard, and cause him to make inquiries as to the truth or falsity of the statement, and, if he did not, he cannot claim to have been acting in good faith, and without notice. Judgment will be allowed for the amount of coal furnished before the date when he received this information, and the rest disallowed."

The Ellen Holgate, (1887) 30 Fed. 125, where the court held:

"Persons supplying provisions for the crew, and those advancing money to pay the claims of material-men, may look to the vessel for payment, if the transactions have taken place away from her home port, and at the request of her master, unless it can be shown that the master was without authority, and that the parties had knowledge of such want of authority."

The International, (1887) 30 Fed. 375, where the court said:

"Had this been a question of materials or supplies furnished by a material-man having knowledge of the terms of the charter, no lien upon the vessel would have been sustained, unless the supplies were furnished in a port of distress, and were necessary to enable the vessel to reach her owners, i. e., unless the supplies were necessary to the ship and her owners, and not merely to the charterer's business." (Citing cases.)

In *The Samuel Marshall,* (1892) 49 Fed. 754, 760, the court in denying a lien for coal furnished on the order of the master, said:

> "But the merchant is presumed to know that it is a common thing for a vessel to be hired, and to be managed and used, in the employment of others, under charter-party with the owner or otherwise, under circumstances where the obligation for supplies does not rest upon the owner. And if the facts presented to him are sufficient to induce a reasonably prudent man, having a just regard to the rights and interests of others, to suppose it probable that the owner is not employing the vessel, but that it is in the service of another, under charter or other agreement involving the payment of charges and expenses by the charterer or lessee, he is bound in good faith to inquire. When the circumstances denote that the owner of the vessel is not the party for whose interest the supplies are furnished, and would not be at fault if they were not paid for, it would be inequitable that a merchant should have the right to give credit to another, and assert a lien therefor, contrary to the stipulations and interests of the owner. * * * The merchant is under no obligation to furnish the supplies. He may do so, or not, and he may sell for cash or on credit, as he thinks advantageous to himself. If he does furnish and on credit, in the face of an agreement between others of which he has notice, devolving the obligation of payment upon another than the owner, and denying to the charterer the right to hypothecate the ship, he ought not to be allowed to assert a lien upon the owner's property."

The decision in this case was affirmed *(The Samuel Marshall*, (1893) 54 Fed. 396) and in writing the opinion of affirmance, Taft, Circuit Judge, said (pp. 398-399):

> "The questions in the case are two: First, Did the libelants obtain a lien for the coal fur-

> nished to the steamer Marshall under the general maritime law? Second. If they did not, then are they entitled to a lien under the state law of Michigan? Judge Severens, in the court below, held, in a satisfactory and convincing opinion, that they had no lien in either aspect of the case, and we entirely concur with him in that view."

Judge Taft also said (p. 404):

> "It is true that, under certain circumstances, the master of a vessel, under a charter, where the charterer is the owner pro hac vice, may hypothecate his vessel for supplies, contrary to the terms of the charter-party, but this is where there is dire necessity to save the vessel, or to bring her home within the reach of the owners. No such case is here presented. This was the home port of the charterers. The necessity was only that of going on the voyages for which the vessel was chartered, and not to bring the vessel home to its owners, or to save it from injury or loss."

The decision was followed in *The Kate,* (1893) 56 Fed. 614, and the latter was affirmed in

The Kate, (1896) 164 U. S. 458,

where the Supreme Court said:

> "If no lien exists under the martime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less one is recognized under the law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the ves-

sel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.

* * * * * *

"If the libelant in this case had furnished the coal upon the order of the master, and without knowledge or notice that the vessel was operated under a charter-party, or if coal had been furnished upon the order of the charterers as well as upon the credit of the vessel, under circumstances which did not charge libelant with knowledge of the terms of the charter-party but charged it only with knowledge of the facts that the vessel was being operated under a charter-party, a different question would be presented."

The opinion of Judge Severens in *The Samuel Marshall* (supra) was approved by the Supreme Court in

The Valencia, (1897) 165 U. S. 264, 272-3,

where it was said:

"Under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter-party requiring him, at his own cost, to provide for necessary supplies and repairs, may pledge the credit of the vessel, it is not necessary now to determine. We mean only to decide, at this time, that one furnishing supplies or making repairs on the order simply of a person or corporation acquiring the possession and control of a vessel under such a charter-party cannot acquire a maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter-party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim."

The opinions rendered in *The Samuel Marshall* (supra) were approved in *The Alvira,* (1894) 63 Fed. 144, 160, in which the court said:

> "Counsel for claimants rely greatly upon *The Samuel Marshall* case, 49 Fed. 754; Id. 4 C. C. A. 385, 54 Fed. 396. The opinions in that case contain a very satisfactory statement of the law of domestic liens, both in the decisions of the district Judge and of the appellate tribunal (Circuit Court of Appeals, Sixth Circuit); but upon a careful reading of the case I do not find anything inconsistent in the law, as there expounded, with that of the case at bar. The facts are of a different character, and this, of course, must be taken into consideration. In that case both the lower court and the appellate tribunal held that actual notice had been given to the supply man. In the case at bar no actual notice was given to the material men, nor am I able find, from the evidence produced, that they were in possession of such facts as ought to have put them upon inquiry, or that their failure to be informed was due to carelessness or indifference. In the case of *The Samuel Marshall* the owner had no actual notice of the furnishing of the coal, and had, therefore, no opportunity of protecting himself by notifying the supply man. In the case at bar the owners were fully apprised of the fact that repairs were being made, and that materials were being furnished therefor. There, the coal for which a lien was claimed was something which the charterer was bound to furnish, and for which the owner received no direct benefit; here the owner derives some benefit in getting back an improved vessel. I do not allude to this last feature as constituting a distinguishing mark which would require the application of different principles of admiralty law, but simply to show that the facts of the Samuel Mar-

shall case are not analogous, in their main features, to the case at bar."

In the course of his opinion in *The Alvira* (supra) Judge Morrow lays down the precise rule for which we contend in this case. He says:

> "Therefore, the general principle that the owner is deemed to consent to the accruing of liens where the entire possession, control, and management of a vessel is intrusted to another is qualified by this condition: If the supply or material man know of the charter or the relation in which the ostensible owner holds, or if he be advised of the real status of such relation by the general owner or by the charterer, or is placed in possession of such facts as would put, or ought to put, a reasonably prudent man on inquiry, the presumption arises that the supplies, materials, or repairs were furnished upon the credit of the charterer himself, and there is no lien. And the onus lies on the supply or material man to remove this presumption. The reason for this is plain. Courts of admiralty do not favor secret liens; otherwise, owners would often fall an easy prey to liens created by injudicious or unscrupulous charterers. Moreover, the supplies, materials, or repairs are generally furnished exclusively for the benefit of the charterer; at least it may be said that he is the party primarily benefited thereby, the owner, as a general rule, being only incidentally benefited, if at all." (Page 156.)

In *The Rosalie*, (1895) 75 Fed. 29, it was held:

> "Where materials were furnished for the use of a vessel, upon the order of a company which had possession of her under a contract of purchase, and which was therefore, the owner pro hac vice, in the port where such company had

its principal place of business, by material men who either knew the company's relation to the vessel, or were in possession of the avenues of information, and of facts sufficient to put them on inquiry, held, that credit must be considered to have been given to the company, and that, consequently, no lien was created. The Alvira, 63 Fed. 144, distinguished.

The mere fact that persons furnishing materials in the home port, on the order of the owner pro hac vice, 'suppose' that the vessel is good for the purchase price, is not of itself sufficient to create a lien."

Another decision which, if followed, is absolutely determinative of the instant case, is *The H. C. Grady,* (1898) 87 Fed. 232, where Judge De Haven said:

"The materials were furnished and repairs made at the request of Captain Denny, the master of the vessel. The remaining libels referred to are for supplies furnished. The evidence shows that the supplies were also furnished for the use of the steamer upon the order of Capt. Denny. Neither of the libelants made any inquiry in relation to the ownership of the steamer, or as to whether she was being operated by any person other than her owner.

It is claimed by the intervener, Strong, that under these circumstances, the libelants are not entitled to enforce a lien against the steamer. I do not think this contention can be sustained. The person upon whose order the supplies were furnished, and repairs made, was the master of the steamer, duly appointed such by the said Strong, her registered legal owner. Strong, as before stated, was and is a resident of Portland, Or., and the supplies were furnished for the use of the steamer, and the repairs made upon her, in San Francisco. It is the rule of the

general maritime law that the master, in the absence of the owner, has authority in a foreign port to bind his owners for necessary repairs and supplies. * * * When these supplies were furnished, and repairs made to the steamer H. C. Grady, her owner, Strong, was absent in Portland, Or., and the steamer was in a foreign port, within the meaning of the martime rule just stated, as it is well settled that a port is deemed to be foreign to a vessel which is not in the State where she belongs, and where her owner resides.

* * * * * *

"There was nothing, in the facts or circumstances, under which the master contracted with either of the libelants, sufficient to suggest the slightest doubt of the actual authority of the master to order the supplies and repairs, and the libelants were therefore not required to make any inquiry as to his actual authority, but had a right to presume that he was clothed with the ordinary powers of a master, and that he was not acting in violation of instructions given him by his principal. The supplies and repairs were necessary, and therefore within the general authority of the master to procure.

* * * * * *

"In addition to what has been said in relation to the contracts under which the several claims of Whelan & Whelan and McMurphy & McAvoy arise, it is proper to state that said libelants supposed that the steamer was responsible for the work performed and materials furnished by them, and that they would have a lien upon her for the value of such work and materials; but neither of said libelants made any inquiry regarding the ownership of the steamer, or whether Crocker & Brooks had any right to pledge the credit of the steamer for the work and materials ordered by them. On August 6, 1897, when perhaps about one-half of their respective claims had accrued, Crocker & Brooks,

as principals, and said libelants as sureties, executed a bond, whereby they became 'jointly and severally bound unto Fed. Strong in the sum of one thousand dollars.'

* * * * * *

"The libelants were informed by the recitals contained in this bond that Strong was the owner of the steamer, and that Messrs. Crocker & Brooks were in possession of, and were about to operate the steamer, under a contract to purchase; and if they were not directly informed by such recitals that the vendees were to permit no claim or lien to accrue against the steamer, while in their possession, and until fully paid for by them, they were at least put upon inquiry as to the terms of such contract. The libelants, however, did not inquire as to the terms of the agreement, and, under such circumstances, there is a conclusive presumption that, if inquiry had been made, they would have been fully informed in relation thereto. They are therefore charged with knowledge of the fact that Crocker & Brooks were in possession of said steamer, under an agreement for its purchase, and by the terms of which they had further agreed with the intervener, Strong, that all alterations in, or repairs which they caused to be made to, such steamer, should be paid for by them, and that they were not to permit any liens to accrue against such steamer while it should be in their possession under that contract.

* * * * * *

"As before stated, some portion of the claim of Whelan & Whelan is for materials furnished and repairs made by them upon the order of the master; what portion, however, does not appear, nor whether such materials were furnished and repairs made before or after the execution of the bond above referred to. If before, it was incumbent upon the libelants to prove the fact, and the value of such materials

> furnished and repairs made; and if after its execution their claim therefor must be held to be subordinate to that of the intervener, Strong, because, as we have seen, they were charged, by the recitals in the bond, with notice of the terms of the contract under which Strong had parted with the possession of the steamer, and such contract was sufficient to put the libelants upon inquiry as to the authority of the master to bind the steamer for materials and repairs while in the possession of Crocker & Brooks, under their contract to purchase, and they made no such inquiry."

Judge Hawley recognized the same doctrine when he said in *The Robert Dollar*, (1902) 115 Fed. 218, 219-220:

> "It is shown by the uncontradicted evidence in this case that, while the Robert Dollar was being operated as a carrier of freight and passengers between Seattle and Nome and other places in Alaska, it was necessary for her to replenish her supplies of coal and water at Dutch Harbor, both in going north and returning; that her master did not have money to pay her bills for these necessaries; and that upon his request the libelant furnished coal, water, and provisions to the steamer, which were necessary for her use and to feed her passengers and crew; that neither the owner nor charterer had any credit at Dutch Harbor; and said supplies had to be obtained on the credit of the ship. These are the conditions under which, by the maritime law, a lien becomes attached to a ship, and the only semblance of a defense to this part of the case is made upon the ground that by the charter party it was agreed between the owner and the charterer that the latter should pay all the bills incurred in operating the vessel during the period for which she was hired, and should at the expiration of said

period, return the vessel to her owner free from liens. It is not pretended that the libelant had actual knowledge of this stipulation in the charter party; but it is claimed that the fact that the vessel was chartered to the Alaska & Pacific Steamship Company had been announced in newspapers, and was generally known among merchants and shipping men, and that the captain had possession of a copy of the charter party; so that if the libelants had made inquiry they might have become informed with respect to its conditions. There are two reasons why this defense cannot prevail. In the first place, the indebtedness was incurred by the master of the ship, who was appointed by the owner, and whose authority was ample to abrogate the agreement whenever it became necessary to do so in order to enable the vessel to get on and complete her voyage. The second reason is that this defense is not available to the charterer. Liens for supplies upon chartered vessels, in favor of creditors to whom notice has been given that the owners have parted with their possession relying upon agreements that the charterers will keep them free from liens, are not permitted, because the pledging of the credit of a ship under such conditions would be fraudulent, and the courts have refused to recognize such fraudulent claims in cases in which the owners have appeared to defend against them. But when a charterer obtains supplies on the credit of a ship in violation of a promise made to the owner that he will not do so, he has no right to plead his own broken promise to defeat his creditors."

Judge Hawley allowed the lien, but the decision was reversed and the libel was dismissed (116 Fed. 601).

In *The George Farwell*, (1900) 103 Fed. 882, the Circuit Court of Appeals said:

29

"The following propositions seem to be established by authority:

"(1) The charterer of a vessel becomes the owner pro hac vice to such an extent that he may bind the ship for repairs and supplies, when there is nothing in the charter restricting him in that particular.

"(2) 'Neither reason nor public policy forbids the owner and the charterer from making' an agreement that the charterer shall supply such things, and keep the ship free of liens therefor. *The Kate,* 164 U. S. 465, 17 Sup. Ct. 138, 41 L. Ed. 516.

"(3) If the person furnishing the labor or supplies knows the terms of such a charter, he cannot have a maritime lien upon a foreign vessel when he furnishes such labor and supplies upon the order of the charterer or the charterer's servants, even though he charges them to the vessel. *The Kate,* supra.

"(4) The same rule will apply even if the person so furnishing labor and supplies has no knowledge of the contents of the charter party, 'If the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim.' *The Valencia v. Ziegler,* 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710."

In *The North Pacific,* (1900) 100 Fed. 490, the Circuit Court of Appeals held:

"The terms of a time charter of a steamer contained provisions indicating that the venture was to some extent a joint one between the owner and charterers. The owner, who was a member of a firm of shipping agents, was to sell the tickets for passage on the contemplated voyages, and his firm were advertised as agents for the vessel. The office of the charterers was

also with such firm, with nothing to indicate that the business was separate. *Held,* that one furnishing to the vessel necessary supplies for the voyage on the order of the master, without either actual or constructive notice of the charter, was entitled to a lien on the vessel therefor, although by the terms of the charter such expenses were to be paid by the charterer."

In *The Underwriter,* (1902) 119 Fed. 713, Judge Lowell reflects upon the facts of the case, the principles evolved from his profound exposition of the history of maritime liens for supplies and repairs and reaches a conclusion diametrically opposed to the conclusion of the Circuit Court of Appeals in the instant case. The conclusion reached by Judge Lowell is correctly stated in the syllabus, as follows:

"A charter-party providing that the charterer shall provide and pay for all the coal used by the vessel, and that the master, although appointed by the owner, shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, is not merely a contract between the parties which binds the charterer to reimburse the owner for coal paid for by the latter, but is also a limitation on the authority of the master to bind the owner or the vessel for such supplies; and no lien upon the vessel exists in favor of libelant who supplied coal on the order of the master in a foreign port, but which was not a port of distress, and was merely across the river from the home port, where the owner resided, and no actual necessity was shown for pledging the credit of the vessel, and where libelant knew the vessel to be under charter,

and was put upon inquiry as to the terms of the charter."

In *The Vigilant,* (1907),151 Fed. 747, Judge Gray, speaking for the Circuit Court of Appeals for the Third Circuit, said (p. 751):

"Notwithstanding the ability of the distinguished judge who delivered the opinion of the court in that case, we are unable to agree that statutory liens of the kind here in question are thus limited. Upon the facts as stated, the case was correctly decided, and the proposition contained in the language above quoted was not necessary to sustain the decision. The Samuel Marshall had been chartered from its owner, with the express stipulation that the charterer was to have full control, employing and discharging officers and men, and with the obligation of paying all running expenses, including the purchase of coal. Libelants furnished coal to the vessel thus chartered, with knowledge of the fact of the charter, and that the master, who ordered the coal, was directly in the employ of the charterer. They also knew that the charterers were under obligation to furnish the coal, and that they had no authority, by themselves or by their agent, to make the owner liable therefor. Under this state of facts, it was held that the supply men had notice that the company had chartered the vessel, and that the coal was furnished on the credit of the charterer, and not of the vessel, and that, therefore, no lien attached under the Michigan statute, giving a lien for all debts contracted for by the owner or master on account of supplies furnished. No debt can be incurred, or lien established on its account, under the maritime law or the statute of the state, except by the authority, express or implied, of the party to be charged. In this case, there was express knowledge by the libelant

> of the stipulation by the charterer, which rebutted any implication of the authority on the part of the master to charge the vessel. The fundamental principles of agency cannot be ignored in the creation of liens, either by the law maritime or the statutory law of the State. The case of The Kate, 164 U. S. 458, 465, 17 Sup. Ct. 135, 140, 41 L. Ed. 512, was decided upon the same grounds."

The last decision preceding the act of 1910, which we have been able to discover is that rendered by the Circuit Court of Appeals of the Seventh Circuit, October 5, 1909, in the case of *Northwestern Fuel Company v. Dunkley-Williams Co.,* 174 Fed. 121.

Every detail of fact in that case is so precisely the same as the details in the instant case, and the decision there is so perfectly contrary to the opinion here, that, we submit, the present decision should not stand without further consideration and without an express disapproval of the conclusion reached by the Seventh Circuit, should it be found that that decision is erroneous.

When one compares Northwestern Fuel Company case (supra), with the instant case, he finds every detail of fact identical. He finds the same provisions respecting the necessity that the charterer shall supply the ship; he even finds "the provision that the charterer will hold the owner harmless from all liens against the vessel," which the learned District Judge felt was so compelling in this case (see opinion pp. 169-170 of Transcript of Record). In the Northwestern Fuel Company case it was fuel

that was furnished, coal to permit the vessel to "discharge its peculiar function" of carrying on maritime commerce. The fuel was sometimes received by the captain, himself, personally. "The engineer usually signed the receipt for coal, but sometimes such receipts were signed by the captain, the same being charged on the books of the libelant to the steamer, care of Chicago and Milwaukee line" (p. 124). The libelant testified that: "He gave credit to the vessel upon the supposition that he would have a lien upon her in any event" (p. 125). In neither case did the owner expressly declare to the charterer, in the charter-party: "Thou shalt not permit a lien to attach to this vessel!" Nor in either charter-party was there anything "that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon" (see opinion p. 169 of Transcript of Record). Yet in the instant case, without even a reference to the decision of the Circuit Court of Appeals for the Seventh Circuit (the last decision of any court prior to the act of 1910), the lien is allowed.

In *Northwestern Fuel Company v. Dunkley-Williams Company* (supra), the Circuit Court of Appeals said:

> "The test of liability herein is conclusively stated by the Supreme Court in the case of The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, as follows, viz.:
>
> " 'One furnishing supplies or making repairs on the order simply of a person or corporation acquiring the control or possession of a vessel

under such charter-party cannot acquire a maritime lien, if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter-party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim.'

"It appears that libelant delivered the coal under the impression that the vessel would be liable therefor in any case. This accounts for its lack of diligence in making investigation as to the facts. The credit was not given to protect the owner's interest in the steamer, but that of parties for the time being operating the boat. Therefore, the question for the court to pass upon is whether libelant had actual knowledge, or was chargeable with knowledge, of the charter-party between appellee and the Chicago Transportation Company. The term 'Chicago and Milwaukee Line' seems to have been merely descriptive of the class of traffic that Petoskey was engaged in, and did not constitute a name. This was of itself a circumstance calculated to raise inquiry. Any effort on the part of libelant to ascertain why the owner of the steamer should operate under such a phrase would have resulted in the discovery of the charter-party and its terms. Nothing short of fatuous confidence in the liability of the steamer for supplies under all conditions can explain the failure to make investigation. Moreover, appellee introduces evidence to the effect that notice of the charter-party was mailed to libelant. The latter denies receiving any such letter. While this may not be conclusive proof of notice, as against libelant it relieves appellee from all suspicion of negligence in the premises, if any would otherwise attach. That no evidence is adduced as to notice to other furnishers of supplies is not persuasive, since the item of coal would be the first to be

looked after. We deem it clearly shown that whatever negligence there was in the premises was that of libelant.

"The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of $1,000 we deem without merit. Appellee was entitled under the agreement to receive the Petoskey free of all liens. The $1,000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility. It is difficult to understand how an owner could protect himself against parties furnishing supplies without using due diligence to ascertain the facts, unless it be required that he do as appellant suggests: paint a notice upon the vessel—a method which does not commend itself to our judgment. This opinion is not at variance with that of Judge Putnam in the case of The Surprise, 129 Fed. 873, 64 C. C. A. 309, since here we find that libelant was put upon notice of the charter-party.

"The finding of the district court is affirmed."

To this point our quotations have been taken from cases decided under the law prevailing prior to the enactment of the act of June 23, 1910. The subsequent quotations come from cases which arose under the act.

In *The City of Milford,* (1912) 199 Fed. 956, an agreed purchaser was in possession of the ship under a contract, and there was nothing therein which unalterably inhibited the purchaser from incurring expenditures on the credit of the ship that

might become a lien thereon. In fact the contract required the purchaser to provide a bond to protect the owner against liens upon the ship. The supplies involved in the libel were furnished upon the order of the master. It would not be simple to conceive of a case more nearly parallel with the instant case. Yet the decision was based entirely upon the question of notice. The court, in its opinion, subjects the testimony to a close analysis, and concludes therefrom that the material-men had no notice that the person in possession held the ship under a notice requiring it to pay for the supplies; and, consequently, allowed the lien. The court said:

> "There is nothing in the evidence to suggest that any of the libelants had notice that the company was not the sole owner of the ship. A number of them proved that, before extending credit, they were told that the company owned the ship. * * *
>
> "The claimant's engineer in person gave the orders for some of the supplies, repairs or services. He approved the bills for others. * * * the claimant, * * * says that had the libelants exercised the reasonable diligence required by the statute, they would have made further inquiry before extending credit.
>
> * * * * * *
>
> "Did the act require them to do all this? Its purpose was to simplify the law. There was need for it. The battle as to the liability of the ship for materials and services furnished it has been going on for centuries. Judge Lowell, in that wonderfully learned and exhaustive opinion of his in The Underwriter, (D. C.) 119 Fed. 713, tells a story of the long struggle. He shows how the questions of substantive law and of policy involved had in the course of hun-

dreds of years become confused and complicated, by being mixed up with differences as to rules of procedure and with disputes as to jurisdiction between the courts of admiralty and those of common law. Rights of materialmen might depend upon whether, when they furnished supplies the ship was in a foreign or in a domestic port. * * * The distinction between foreign and domestic ports had come to be without substantial reason. Congress, in the act referred to, has abolished it.

* * * * * *

"The general purpose of this enactment is plain. Hereafter, when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the materialman knows nothing about the authority of the person in possession of the ship, except that he visibly has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person entrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If, under such circumstances, a materialman furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say: 'I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them; but I did not know whether that which I had heard was true or not. I could easily have made inquiries, and,

if I had inquired, I would have found out the truth; but I did not do so.'

"He who is so careless of other men's rights will find that his own will be determined, not by what he absolutely knew, but by what it was in his power to find out, if he had acted with ordinary and reasonable care. And so the act provides that nothing in it shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter-party, or agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries, was without authority to bind the vessel therefor.

"Before this proviso can have any application, something must have occurred to put the furnisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of a vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as to whether the person who has the management of the ship has the right to pledge its credit." (Citing cases.)

The *Thomas W. Rodgers,* (1912) 197 Fed. 772, and *The Ha Ha,* (1912) 195 Fed. 1013, are each of the same assistance in the present problem as is *The City of Milford* (supra).

The J. Doherty, (1913) 207 Fed. 997, cannot, we submit, be distinguished from this case. There the person ordering the towage was authorized under the Act of 1910 to bind the vessel, because he was the managing owner of the charterer. Yet the court held there was no lien. The court said (page 1001):

> "In the light of these principles the case at bar presents no difficulty. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat, and the fact that the owner paid the man in charge is not sufficient to prevent the charter from being a demise of the boat. Monk v. Cornell Steamboat Co., 198 Fed. 472; 117 C. C. A. 232. The fact that the charter was oral, without any express statement of the terms thereof, is immaterial. By an implied agreement, as effectual in law as if it were expressed, the charterer is bound to disburse the vessel and to to protect her from liens. Moreover, so far as knowledge of the charter-party on the part of the libelant is concerned, or his duty to inquire, there is no essential distinction, for if the libelant knows that the vessel is chartered, though orally and informally he must be held to know, as a matter of course, that the usual obligations exist. The Surprise, 129 Fed. 873; 64 C. C. A. 309. It is quite possible that the libelant believe that it had a lien, no matter who was relied upon to pay. But this was not giving credit to the vessel. The Samuel Marshall, 54 Fed. 398; 4 C. C. A. 385. Nor was its method of charging the items. McCaldin v. The Stroma, 53 Fed. 281; 3 C. C. A. 530. Knowledge that the boat was chartered, and the necessary implication in such a business as this that the charterer should pay for towage, as well as the course of dealing directly with the charterers, and the testimony of the libelant's clerk, Oliver,

> as to the usual practice of collecting from charterers are sufficient to prevent a recovery from the libelant." (Citing cases.)

In *The Malloa,* (1014) 214 Fed. 308, the person in charge was not inhibited from incurring any expense on the credit of the vessel which might become a lien thereon, and yet Judge Cushman proceeded to consider the question of notice and decided (we quote from the syllabus):

> "Facts considered, and held not such as to put one making repairs on a vessel on inquiry as to the authority of the person contracting for the repairs, who was an agreed purchaser of a part interest, and in possession, to bind the vessel therefor under the provisions of Act June 23, 1910."

In *The Francis J. O'Hara, Jr.,* (1915) 229 Fed. 312, the court said:

> "It is not contended that under the general admiralty law a lien would attach for this salt. The lien claimed arises, if at all, under the Act of June 23, 1910 (U. S. Comp. St. 1913, Sec. 7785), which provides in substance that any person furnishing supplies to a vessel shall be entitled to a lien, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel. It further provides (Section 3) that nothing in the Act shall be construed to create a lien when the furnisher, by the exercise of reasonable diligence, could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor. The salt was ordered by the master of the vessel. He was in fact without authority to bind the vessel therefor. Rich v. Jordan, 164 Mass. 127; 41 N. E. 56.

"The real question is whether, upon the agreed facts, the intervening petitioner could, 'by the exercise of reasonable diligence', have ascertained the master's lack of authority. The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others she would not. It made no inquiry whatever, either from the master or the managing owners, though it might easily have done so, as to what lay she was being operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth. On several previous occasions salt had been furnished by the petitioner to the vessel when she was on the one-half lay, and was therefore liable for it, and it had been paid for by the owners. The last time before that here in question was more than two years previous, in May, 1909; and there had not been thereafter anything equivalent to a continuous course of dealing between the vessel and the petitioner, from which authority to buy supplies on her account might be inferred. There was no actual or constructive representation that the vessel was on the half lay or was liable for supplies when this salt was purchased.

"The case is not like The City of Milford (D. C.) 199 Fed. 956, where the libelants acted on information which they supposed reliable, and were held to have been justified in so doing, though the information turned out to be false. It is said in the opinion in that case: 'I am persuaded that those witnesses who have testified that he (the president of the company which was the agreed purchaser of the vessel) and the other agents of the company lead them (the lienors) to believe that it was the owner of the ship have testified truthfully and accurately.' Rose, District Judge, The City of Milford, (D. C. ubi supra) 199 Fed. at 958.

"Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to those important facts.

"It seems to me that the petitioner, knowing that the vessel was on a lay, was bound to inquire whether that lay was one under which she, or the master and crew, were to pay for the salt. The Eureka, (D. C. Cal.) 209 Fed. 373. The slightest inquiry would have disclosed that the master had no authority to buy it on the vessel's account."

In *The Oceana,* (1916) 233 Fed. 139 (affirmed by the Circuit Court of Appeals for the Second Circuit in 244 Fed. 80), the provisions respecting payment for repairs, keeping the vessel free from liens and holding the owner harmless from all liens asserted against the vessel, are substantially the same as the corresponding provisions of the charter party in the instant case.

"Until the ship should be fully paid for the purchaser covenanted, among other things:

"(a) To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted the same shall be immediately bonded by the purchaser. The purchaser agrees to promptly pay current bills, for supplies and repairs to said ship and exhibit at reasonable times the ship's accounts, and bills to seller's representatives.

"(b) To keep said ship and equipment in good repair."

Nevertheless the court in confirming the report of James K. Symmers, Esq., the special commissioner,

recognized that the fact that the vessel was chartered had been brought to the attention of at least one of the materialmen (Kniffen & Demarest Company), and that no lien could be asserted by it.

In *The Yankee,* (1916) 233 Fed. 919, the court allowed the libel because the supply-man had no knowledge that the vessel was under charter. The court said (pp. 925-6):

> "But it is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. The Patapsco, 80 U. S. (13 Wall.) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred 'when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, agreement for sale of the vessel, or for any other reason a person ordering repairs, supplies or other necessaries, was without authority to bind the vessel therefor'. This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States. The Kate, 164 U. S. 458; The Valencia, 165 U. S. 264. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or

> no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies or the presumptions of the law."

In the course of its opinion in the instant case, the Circuit Court of Appeals says (see opinion, p. 163 of Transcript of Record):

> "There is a divergence of opinion among the cases as to whether a charter party of the nature and character of the one here involved withdraws the authority of the master to act for the owner in the ordering of repairs, supplies, etc. Judge Lowell has held, in a most learned and searching opinion, that it does. *The Underwriter* (supra). But this decision is disapproved by the Circuit Court of Appeals of his Circuit in the case of *The Surprise,* 129 Fed. 873, which impresses us as being based upon the stronger reasoning."

We respectfully submit that the court was in error in concluding that the opinion of Judge Lowell in *The Underwriter* was disapproved in *The Surprise. The Underwriter* is neither mentioned nor referred to in *The Surprise.* The significance of that omission becomes compelling when one realizes that both cases arose in the same circuit; that the opinion in *The Underwriter* is now and was then, recognized generally by courts and commentators as one of the most scholarly expositions available, of a proposition of maritime law; and that the two cases were decided within a period of two years.

The decision in *The Surprise* was concerned with a different question from that concerned in *The Underwriter.*

Judge Putnam, in his opinion, limits *The Surprise* to a case concerning "hand to mouth necessities." He says in his opinion:

> "We wish, also, before taking up the detailed facts on this appeal, to lay aside another element. What were furnished by these libelants were *hand to mouth necessities.*" (34 C. C. A. at page 313.)

Judge Lowell in *The Underwriter* recognized that under some circumstances a lien would be allowed. Judge Lowell says (page 764):

> "Where, however, the charter limitation is that found in this case, and where the coal is ordered, not in a port of distress, when it may reasonably be supposed that the further prosecution of the voyage is for the interest of the owner as well as for that of the charterer, I am of opinion that no lien exists."

The Surprise is based upon facts vitally different from those concerned in this case. *The Underwriter* is based upon facts identical with those concerned in this case.

In *The Surprise* the supplies were "hand to mouth necessities" (supra), and Judge Putnam's opinion is based upon that circumstance. This fact is recognized by libelant's counsel; it is emphasized by the court which rendered the decision and it is so declared by commentators.

Counsel for libelant in referring to *The Surprise* says:

> "The court observes that, although the vessel was not in a port of distress, the supplies furnished were hand to mouth necessities, and

> so they were in the case at bar. We prefer, however, not to put the case on that basis, but to regard it from a strictly logical standpoint, as did the judge of the lower court."

Indeed, libelant readily recognized that he could not put his case on the basis that the supplies were "hand to mouth necessities", notwithstanding that some of them WERE LIQUORS AND CIGARS. (See bills of account, pp. 147 and 155 of Transcript of Record.)

Judge Putnam was very careful to limit the effect of his opinion in *The Surprise* to the case of "hand to mouth necessities". In the course of his opinion, he says:

> "We have no occasion to comment upon, or lay down any rules with reference to circumstances involving unusual expenses, and with regard to which there would be *ample opportunity to consult the owners* in the usual manner. What, in such event, would be required, in view especially of the fact that *The Surprise* was *a chartered vessel,* is not now relevant (p. 314).
>
> We have an ordinary case of minor supplies furnished to a vessel in a foreign port of the class of which she had immediate need, and a large part of which she could not take up conveniently, except at the place where needed; a case with circumstances under which prior to The Kate and The Valencia, no admiralty court ever refused a lien, unless the owner showed that there was no necessity for credit to the vessel, and that the *merchant* knew that fact, or had very good reason to know it, *or was in some way clearly put on inquiry.* (p. 315.) * * * The conditions with regard to the supplies of the classes furnished by Robin-

son, when obtained by the authority of the master, express or implied, under the circumstances of this case, are commonly so pressing that they overcome the merely ordinary stipulations on the part of the charterer that he will not burden the vessel with liens." (p. 316.)

A few weeks after rendering his opinion in *The Surprise,* Judge Putnam wrote the opinion in *The New Brunswick,* 129 Fed. 893, and there he said:

> "The petitioner undertakes to bring this appeal within The Surprise (decided by us on March 29, 1904), 129 Fed. 873, and The Philadelphia, 75 Fed. 684, 686, 21 C. C. A. 501, also decided by us. This he fails to do. In each of these cases, *hand to mouth supplies were furnished* at intermediate ports on the orders of the master, or under such circumstances that they were presumed to be by his orders. Certainly there is nothing in this record to enable us to frame a judgment for any portion of the coal in issue as having been thus ordered."

In *The Philadelphia,* (1896) 75 Fed. 684, 685, (the basis of the decision in *The Surprise*) Putnam, Circuit Judge, said:

> "The learned Judge of the District Court found that the supplies, in all of the suits, were furnished on the credit of the respective vessels, and that the libelants had no notice that the vessels were under charter in which it was agreed that the supplies should be furnished at the expense of the charterers. * * *
>
> "The supplies were the reasonable hand to hand quantities of coal and water needed for their use in short coastwise trips."

Another circumstance which, we submit, demonstrates that *The Surprise* does not govern, or even

apply to the instant case, is found in the language of the judge who wrote the opinion. It will be remembered that *The Surprise* is based upon the decision of the same court in *The Philadelphia* (supra), and it was of this case that Judge Putnam, who wrote the opinion in *The Surprise,* himself, said (*The Iris,* 100 Fed. 104, 107):

> "In the Philadelphia * * *, where it was maintained that the facts were similar to those in The Kate and the Valencia, the question which arose in those cases was laid aside, because the court found that the supplies were furnished under such circumstances that they were to be held as furnished in a foreign port on the orders of the master, thus bringing the circumstances within * * * the supposed hypothetical case stated in The Kate at pages 470 and 471; 164 U. S."

The hypothetical case to which Judge Putnam refers is stated by the Supreme Court (164 U. S. 470, 471) as follows:

> "If the libelant in this case had furnished the coal upon the order of the master, *and without knowledge or notice that the vessel was operated under a charter-party,* or if the coal had been furnished upon the order of the charterer as well as upon the credit of the vessel, *under circumstances which did not charge libelant with knowledge of the terms of the charter-party,* but charged it only with knowledge of the fact that the vessel was being operated under a charter-party, *a different question would be presented.*"

So Judge Putnam practically says that *The Philadelphia,* the basis of *The Surprise,* was decided upon the theory that the furnisher either was ignor-

ant of the charter-party or was ignorant of its terms. Surely a theory which cannot prevail in this case, wherein it is specifically found that the furnisher was notified that the South Coast was under charter and that the charterer was required to pay all bills!

In addition to the evidence which Judge Putnam, himself, furnishes of the fact that his decision in *The Surprise* is limited to the case of "hand to mouth necessities", and in addition to the admission in this regard, or libelant's counsel, we have the criticism of Mr. Fitz-Henry Smith, Jr., in 21 Harvard Law Review 345, where, in referring to *The Surprise,* the commentator says:

> "The opinion lays great emphasis upon the character of the necessaries furnished the vessel."

In the opinion of the Circuit Court of Appeals, it is pointed out that the:

> "terms of the present charter-party as respects the furnishing of repairs, supplies, etc., are * * * those usual to most charter parties".

Furthermore it is said in the opinion:

> "There is a divergence of opinion among the cases as to whether a charter-party of the nature and character of the one involved withdraws the authority of the master to act for the owner in the ordering of repairs, supplies, etc".

It is the combination of these two features which renders this case one of utmost gravity and importance. We have a case for the interpretation of a charter-party whose form is current wherever nav-

igable waters touch the land of the United States. And we have a case where the Circuit Court of Appeals has said there is a divergence of opinion among the courts as to the proper interpretation of this universally used form of charter-party.

The divergence, as we see it, results from the opinion in this case.

Precisely the conditions and facts here involved were presented to the Circuit Court of Appeals for the Second Circuit in *Kniffen & Demarest Company Cross Appeal* in *The Oceana,* (1917) 244 Fed. 80, and the court actually reached a perfectly contradictory result from the result reached in the instant case.

In *The Oceana* (1917) (supra) it was held:

> "The agreement of sale contained, among others, the following covenant by the vendee:
>
> '(5) Until said ship is completely paid for, the purchaser covenants as follows:
>
> '(a) To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted, the same shall be immediately bonded by the purchaser. The purchaser agrees to promptly pay current bills for supplies and repairs to said ship, and exhibit at reasonable times the ship's accounts and bills to seller's representatives.'
>
> "*The libelants contend that this provision as to bonding is an authority to the vendee to create liens; but we regard it, on the contrary, as a prohibition added out of abundant caution.* (p. 81.) * * *
>
> "The Morse Company, claimant, has assigned error to the decree in allowing any of the claims, and *Kniffen & Demarest Company have assigned error for dismissing their libel.* * * *

> "We agree with Judge Veeder that the Bermuda Company was a person intrusted with the management of the steamer within the meaning of Section 2 of the act, while she was lying in the vendor's yard, and that repairs, supplies, or other necessaries furnished between December 10th and 25th, when she was actually delivered and removed, are as much entitled to a lien as those furnished subsequently. *We also concur with his finding, and that of the commissioner, that Kniffen & Demarest Company had sufficient notice to put them on inquiry, and that therefore their libel was properly dismissed.*"

The Circuit Court of Appeals for the Seventh Circuit in *Northwestern Fuel Company v. Dunkley-Williams Company,* (1909) 174 Fed. 121, a case identical with the instant case, reached a conclusion diametrically opposed to the conclusion reached in the present case.

The same observation applies when one compares the instant case with the masterly opinion of Judge Lowell in *The Underwriter,* (1902) 119 Fed. 713.

II.

The second proposition announced by the Circuit Court of Appeals is the following:

A SHIPOWNER'S IMMUNITY FROM THE NECESSITY OF PAYING THE SHIP'S BILLS DOES NOT RELIEVE HIS SHIP FROM A LIKE NECESSITY.

We respectfully submit that the application of such a principle is very striking. If an owner need

not pay money, but his property will be sold under a lien if he does not pay it, assuredly he is without much comfort! If a person's property may be sold for a debt which he need not pay, assuredly he will conclude that it is only sophistry to say that he need not pay it!

The very point has been considered.

In *The Sarah Cullen,* 45 Fed. 511, the court said:

> "the libelant was informed that the Ridgewood Ice Company was to pay the towage which was equivalent to notice that the vessel was not to pay it".

In *The Iris,* 100 Fed. 104, 109 (the Circuit Court of Appeals for the First Circuit) said:

> "The charterer of a vessel, who has no interest in her hull except for a temporary use under the charter, cannot be said to be procuring supplies at his own charge if he procures them under such circumstances as would impose a lien on what is the property of the person who lets the vessel."

Surely it cannot be said that any principle of law justifies the conclusion that a man's property is not immune from lien for a debt which the man himself is not required to pay!

Two things equal to the same thing are equal to each other.

III.

The third proposition which the Circuit Court of Appeals announced is the following:

THE PROVISION OF THE CHARTER-PARTY REQUIRING THE CHARTERER TO HOLD THE OWNER HARMLESS FROM ANY LIEN ASSERTED FOR SUPPLIES FURNISHED THE SHIP, IS TANTAMOUNT TO A DECLARATION BY THE OWNER THAT SUCH LIENS MAY BE ASSERTED.

THIS CONCLUSION IS IN PERFECT CONFLICT WITH THE CONCLUSION REACHED BY THE CIRCUIT COURTS OF APPEALS FOR THE SECOND AND SEVENTH CIRCUITS RESPECTIVELY.

The identical proposition was presented to and repudiated by Circuit Judges Coxe, Ward and Rodgers in *The Oceana,* (1917) 244 Fed. 80, 81; and Circuit Judges Grosscup, Baker and Kohlsaat in *Northwestern Fuel Company v. Dunkley-Williams Co.,* (1909) 174 Fed. 121.

Not only was the identical proposition so presented and repudiated, but the proposition was predicated, as in this case, upon the provision of a charter-party which, as has been pointed out, is in universal use throughout the seaboard of the United States.

We respectfully submit that the present day expansion of American shipping is such that a conflict on so important and prevalent a provision should be definitely resolved.

We cannot better indicate the striking conflict than by setting forth, *pari passu,* the conclusions of the several courts:

Instant case, Circuit Court of Appeals for the Ninth Circuit:

"The terms of the present charter-party as respects the furnishing of repairs, supplies, etc. are only those usual to most charter parties, and *by reason of the provision that the charterer will hold the owner harmless from all liens against the vessel, there is an implication of authority on the part of the charterer to incur such expenses on the credit of the vessel.*"

(See opinion, pp. 169-170 of Transcript of Record.)

The Oceana (supra), Circuit Court of Appeals for the Second Circuit:

"The agreement of sale contained, among others, the following covenant by the vendee: * * * 'To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted, the same shall be immediately bonded by the purchaser.' *The libelants contend that this provision as to bonding is an authority to the vendee to create liens; but we regard it, on the contrary, as a prohibition added out of abundant caution.*"

(244 Fed. 80, 81.)

Northwestern etc. Co. v. Dunkley-Williams Co. (supra), Circuit Court of Appeals for the Seventh Circuit:

"The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of $1000 we deem *without merit.* Appellee was entitled under the agreement to receive the Petoskey free of all liens. The $1000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. *It was evidently placed in the charter-party for the benefit of appellee and not for the solace of those furnishing supplies without reasonable investigation as to responsibility.*"

(174 Fed. 121, 124.)

See, also,

The City of Milford, 199 Fed. 956;
The Gen. J. A. Dumont, 158 Fed. 312;
The Golden Rod, 151 Fed. 6;
Quarles, (District Judge) in *Northwestern v. Dunkley,* 174 Fed. 124, 126-7.

BY THE TERMS OF THE CHARTER-PARTY IN THE INSTANT CASE, AND BY VIRTUE OF THE NOTICE WHICH THE TRIAL JUDGE FOUND WAS GIVEN LIBELANT, THE CHARTERER AND HIS MASTERS AND HIS AGENT, MR. MILLS (Apostles, p. 27), WERE WITHOUT AUTHORITY TO BIND THE VESSEL FOR THE SUPPLIES ORDERED BY THEM RESPECTIVELY.

This conclusion follows from the construction which the parties themselves put upon the contract, and from the fact that they promptly notified the libelant of that construction, and from the fact that the libelant never saw or sought to see the charter-party and had no knowledge of its terms, except the knowledge acquired from the statements made to him by the owner, the charterer and his agent.

This conclusion follows furthermore from a consideration of the law as it stood when the statute was enacted. The law then declared that if a charterer be required to provision the ship, and the materialman knows or ought to know that fact, then the ship shall not be liable. As Judge Brown said in *The Sarah Cullen,* 45 Fed. 511, notice that a charterer was to pay for services is "equivalent to notice that the vessel was not to pay it". The Congress did not alter this law. It merely required the materialman to be protected if innocent; but if notified, it required him to pursue that notice, perhaps to call for the charter-party and to determine therefrom whether the owner or charterer was required to furnish the supplies. The law never contemplated that there should be used the precise words "the charterer cannot bind the ship". That conclusion resulted as a fact from the circumstance

that the charterer agreed by the charter-party to pay the bills.

That is the precise conclusion which Judge Lowell reached in *The Underwriter* (supra) when he decided that the language used in the charter-party constituted "a limitation on the authority of the captain" *and not* "merely a contract made by the charterer with the owner that the former will pay for supplies in the first instance, and, in case this is not done for any reason, will reimburse the owner for supplies paid for by the latter".

And the same conclusion was reached by Judge Morton when in 1915, he decided that a materialman occupying even a more favorable position than that occupied by Rudbach in this case, was not entitled to a lien (*The Francis J. O'Hara, Jr.,* 229 Fed. 312). In the present case the materialman was warned. In the *O'Hara* case he was bound by facts which he would have known if he had made inquiry. We quote from the opinion as follows:

> "It is not contended that under the general admiralty law a lien would attach for this salt. The lien claimed arises, if at all, under the Act of June 23, 1910 (U. S. Comp. St. 1913, Sec. 7785), which provides in substance that any person furnishing supplies to a vessel shall be entitled to a lien, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel. It further provides (section 3) that nothing in the Act shall be construed to create a lien when the furnisher, by the exercise of reasonable diligence, could have ascertained that the person ordering the supplies was without authority to

bind the vessel therefor. The salt was ordered by the master of the vessel. He was in fact without authority to bind the vessel therefor. Rich v. Jordan, 164 Mass. 127; 41 N. E. 56.

The real question is whether, upon the agreed facts, the intervening petitioner could, 'by the exercise of reasonable diligence,' have ascertained the master's lack of authority. The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others she would not. It made no inquiry whatever, either from the master or the managing owners, though it might easily have done so, as to what lay she was being operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth. On several previous occasions salt had been furnished by the petitioner to the vessel when she was on the one-half lay, and was therefore liable for it, and it had been paid for by the owners. The last time before that here in question was more than two years previous, in May, 1909; and there had not been thereafter anything equivalent to a continuous course of dealing between the vessel and the petitioner, from which authority to buy supplies on her account might be inferred. There was no actual or constructive representation that the vessel was on the half lay or was liable for supplies when this salt was purchased.

The case is not like The City of Milford (D. C.), 199 Fed. 956, where the libelants acted on information which they supposed reliable, and were held to have been justified in so doing, though the information turned out to be false. It is said in the opinion in that case: 'I am persuaded that those witnesses who have testified that he (the president of the company which was the agreed purchaser of

the vessel) and the other agents of the company led them (the lienors) to believe that it was the owner of the ship have testified truthfully and accurately.' Rose, District Judge, The City of Milford (D. C.) ubi supra, 199 Fed. at 958.

Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to those important facts.

It seems to me that the petitioner, knowing that the vessel was on a lay, was bound to inquire whether that lay was one under which she, or the master and crew, were to pay for the salt. The Eureka (D. C. Cal.) 209 Fed. 373. The slightest inquiry would have disclosed that the master had no authority to buy it on the vessel's account."

The conclusion reached in these two cases *(The Underwriter* and *The Francis J. O'Hara Jr.),* the one decided before the statute of 1910, the other after, indicates fairly, we submit, that if a charterer be bound to furnish supplies to the ship and that that fact be known, actually or constructively, to a materialman, then the ship shall not be subject to a lien for the supplies, even though the charter-party did not in precise words provide "the charterer cannot bind the ship".

This proposition would seem particularly to follow, if one apply the rule announced in *The Surprise,* that even though the charter-party be silent upon the point, the charterer must provide supplies

for the chartered vessel and *protect her from liens.* The court there said (129 Fed. 873, 877-8):

> "We should also observe that much has been made of the fact that in The Kate and The Valencia, there were formal charter parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses, and protect her from all liens on account thereof. There seems to be an impression that there was something in this fact of special importance; and it has apparently appealed to the legal imagination. It was however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the parties are the same as those specially provided in The Kate and The Valencia. The charter (charterer) is bound to disburse the vessel and *protect her from liens,* and impliedly agrees to do so, an agreement as effectual in law as an express one. Moreover, so far as concerns knowledge on the part of a merchant of a charter party or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because, if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that the usual obligations pro and con exist; and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact because all the decisions we will hereafter cite relating to vessels where the hull was chartered, bear on The Kate and The Valencia, regardless of the fact whether there was a formal charter or only an oral one without any express statement of the terms thereof."

However, in considering the effect of the decision in *The Surprise,* it is but fair to bear in mind that

the supplies considered therein were "hand to mouth necessities". This appears at once from *The New Brunswick,* 129 Fed. 893, where the court said:

> "The petitioner undertakes to bring this appeal within The Surprise (decided by us on March 29, 1904) 129 Fed. 873, and The Philadelphia, 75 Fed. 684, 686, 21 C. C. A. 501, also decided by us. This he fails to do. In each of these cases, hand to mouth supplies were furnished at intermediate ports on the orders of the master, or under such circumstances that they were presumed to be by his orders. Certainly there is nothing in this record to enable us to frame a judgment for any portion of the coal in issue as having been thus ordered."

In *The J. Doherty,* 207 Fed. 997, the court considered the power of one who had rendered a towage service to a vessel which he knew to be under charter, to assert a lien upon the vessel. After deciding that the towage was not a necessary within the meaning of the act, the court proceeded to state (p. 1001):

> "In short, for towage services rendered in the exigencies of navigation there is at least a presumptive lien upon the boat. Whether such presumption arises, or whether the lien exists, depends upon the circumstances under which the services are rendered. If it appear that the services were not rendered upon the credit of the boat, or *that the surrounding circumstances were such as to apprise the tower that they were not to be so rendered, then no lien exists.* The Kate, 164 U. S. 458; The Valencia, 165 U. S. 264.

In the light of these principles, the case at bar presents no difficulty. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat, and the fact that the owner paid the man in charge is not sufficient to prevent the charter from being a demise of the boat. Monk v. Cornell Steamboat Co., 198 Fed. 472, 117 C. C. A. 232. The fact that the charter was oral, without any express statement of the terms thereof, is immaterial. By an implied agreement, as effectual in law as if it were expressed, the *charterer is bound to disburse the vessel and to protect her from liens.* Moreover, so far as knowledge of the charter party on the part of the libelant is concerned, or his duty to inquire, there is no essential distinction, for if the libelant knows that the vessel is chartered, though orally and informally, he must be held to know, as a matter of course, that the usual obligations exist. The Surprise, 129 Fed. 873, 64 C. C. A. 309. *It is quite possible that the libelant believed that it had a lien, no matter who was relied upon to pay. But this was not giving credit to the vessel.* The Samuel Marshall, 54 Fed. 398, 4 C. C. A. 385. *Nor was its method of charging the items.* McCaldin v. The Stroma, 53 Fed. 281, 3 C. C. A. 530. Knowledge that the boat was chartered, and the necessary implication in such a business as this that the charterer should pay for towage, as well as the course of dealing directly with the charterers, and the testimony of the libelant's clerk Oliver as to the usual practice of collecting from charterers are sufficient to prevent a recovery by the libelant." (Citing cases.)

Finally, upon this point we submit the following proposition and authorities therefor:

Supplies furnished a chartered vessel when she is not in distress or in such a position that the supplies availed the owner as well as the charterer, cannot constitute the basis of a lien, if the vessel were held under a charter-party which required the charterer to furnish the supplies and the furnisher knew the facts or by the exercise of reasonable diligence could have ascertained them. And this is so even though the supplies were furnished at the instance of the master.

The Columbus, 5 Sawy. 487; Fed. Cas. 3044;
The William Cook, 12 Fed. 919;
The S. M. Whipple, 14 Fed. 354;
The Ellen Holgate, 30 Fed. 125;
The Cumberland, 30 Fed. 449;
The Sarah Cullen, 45 Fed. 511;
The Samuel Marshall, 49 Fed. 754;
The Burton, 84 Fed. 998, 999;
The Tillie A., 84 Fed. 684, 685;
The H. C. Grady, 87 Fed. 232;
The Algonquin, 88 Fed. 318, 319;
The North Pacific, 100 Fed. 490;
The Underwriter, 119 Fed. 713;
The O. H. Vessels, 183 Fed. 561, 562-3;
The City of Milford, 199 Fed. 956, 959-960;
The J. Doherty, 207 Fed. 991-1001;
The Francis J. O'Hara Jr., 229 Fed. 312;
The Kate, 164 U. S. 458.

Returning, for a moment, to another illustration of the "bad faith" doctrine, we find the decision of Judge De Haven in *The H. C. Grady,* 87 Fed. 232, 233 et seq., where it is said:

> "I think it sufficiently appears from the evidence that, under the agreement, the legal title of the steamer was not to be transferred until

the payment of the balance due upon the contract of purchase; and it was also agreed that the purchasers were, at their own expense, to make such repairs and changes in the construction and equipment of the steamer as they might deem necessary, and were to permit no liens to be filed against her while in their possession, and prior to the time when they should make final payment on account of the purchase price, and Messrs. Crocker & Brooks subsequently gave to said Strong a bond to secure performance of their agreement in this respect. Strong was a resident of Portland, Or., and, prior to her delivery to the purchasers under this agreement, the steamer was duly registered in the office of the collector of customs for that district, by the said Strong, as owner; and one James E. Denny was appointed by him as her master, *and he was instructed by Strong, in effect, to look after his interests, and see that no bills were incurred against the steamer until she was fully paid for.* Denny was also the agent of Crocker & Brooks, and acted for them in the negotiation concerning the purchase and delivery of the steamer. After Strong parted with her possession, under the agreement above stated, the steamer was brought to this state, and from the time of her arrival here until some time in September, 1897, was employed by Crocker & Brooks and others, who seem to have made some agreement with them for interests in the steamer, in carrying passengers and freight between San Francisco and different places on the Sacramento river; and, during the time while she was thus in the possession of Crocker & Brooks, supplies were furnished to the steamer by certain of the libelants; and materials furnished for her use, and repairs made upon her, and services rendered on board, by other libelants.

1. In my opinion, the contract between the intervenor, Strong, and Crocker & Brooks, and

under which possession of the steamer was delivered to the latter, was a conditional sale.
* * * * * *

2. The libels of the Black Diamond Coal-Mining Company, Meyer & Akmann, H. P. Christie, and C. J. Sbarbaro may be considered together. That of H. P. Christie is for materials furnished and used by him in making certain repairs upon the steamer, and for labor performed by him in making such repairs. The materials were furnished and repairs made at the request of Captain Denny, the master of the vessel. The remaining libels referred to are for supplies furnished. The evidence shows that the supplies were also furnished for the use of the steamer upon the order of Capt. Denny. Neither of the libelants made any inquiry in relation to the ownership of the steamer, or as to whether she was being operated by any person other than her owner.

It is claimed by the intervener, Strong, that, under these circumstances, the libelants are not entitled to enforce a lien against the steamer. I do not think this contention can be sustained. The person upon whose order the supplies were furnished, and repairs made, was the master of the steamer, duly appointed such by the said Strong, her registered legal owner. Strong, as before stated, was and is a resident of Portland, Or., and the supplies were furnished for the use of the steamer, and the repairs made upon her, in San Francisco. It is the rule of the general maritime law that the master, in the absence of the owner, has authority in a foreign port to bind his owners for necessary repairs and supplies. * * * When these supplies were furnished, and repairs made to the steamer H. C. Grady, her owner, Strong, was absent in Portland, Or., and the steamer was in a foreign port, within the meaning of the maritime rule just stated, as it is well settled that a port is deemed to be foreign to a vessel which

is not in the state where she belongs, and where her owner resides.

* * * * * *

There was nothing, in the facts or circumstances under which the master contracted with either of the libelants, sufficient to suggest the slightest doubt of the actual authority of the master to order the supplies and repairs, and the libelants were therefore not required to make any inquiry as to his actual authority, but had a right to presume that he was clothed with the ordinary powers of a master, and that he was not acting in violation of instructions given him by his principal. The supplies and repairs were necessary, and therefore within the general authority of the master to procure.

* * * * * *

In addition to what has been said in relation to the contracts under which the several claims of Whelan & Whelan and McMurphy & McAvoy arise, it is proper to state that said libelants supposed that the steamer was responsible for the work performed and materials furnished by them, and that they would have a lien upon her for the value of such work and materials; but neither of said libelants made any inquiry regarding the ownership of the steamer, or whether Crocker & Brooks had any right to pledge the credit of the steamer for the work and materials ordered by them. On August 6, 1897, when perhaps about one-half of their respective claims had accrued, Crocker & Brooks, as principals, and said libelants as sureties, executed a bond, whereby they became 'jointly and severally bound unto Fred R. Strong in the sum of one thousand dollars'.

* * * * * *

The libelants were informed by the recitals contained in this bond that Strong was the owner of the steamer, and that Messrs. Crocker & Brooks were in possession of, and

were about to operate the steamer, under the contract to purchase; and if they were not directly informed by such recitals that the vendees were to permit no claim or lien to accrue against the steamer, while in their possession, and until fully paid for by them, they were at least put upon inquiry as to the terms of such contract. The libelants, however, did not inquire as to the terms of the agreement, and, under such circumstances, there is a conclusive presumption that, if inquiry had been made, they would have been fully informed in relation thereto. They are therefore charged with knowledge of the fact that Crocker & Brooks were in possession of said steamer, under an agreement for its purchase, and by the terms of which they had further agreed with the intervenor, Strong, that all alterations in, or repairs, which they caused to be made to, such steamer, should be paid for by them, and that they were not to permit any liens to accrue against such steamer while it should be in their possession under that contract.

* * * * * *

As before stated, some portion of the claim of Whelan & Whelan is for materials furnished and repairs made by them upon the order of the master; what portion, however, does not appear, nor whether such materials were furnished and repairs made before or after the execution of the bond above referred to. If before, it was incumbent upon the libelants to prove the fact, and the value of such materials furnished and repairs made; *and if after its execution their claim therefor must be held to be subordinate* to that of the intervenor, Strong, because, as we have seen, they were charged, by the recitals of the bond, with notice of the terms of the contract under which Strong had parted with the possession of the steamer, and such contract was sufficient to put the libelants upon

inquiry as to the authority of the master to bind the steamer for materials and repairs while in the possession of Crocker & Brooks, under their contract to purchase, and they made no such inquiry."

In *The Mary A. Tryon,* 93 Fed. 220, 221, Judge Brown said:

> "*It is aginst conscience* that in a business like this towages for the charterer's account, when the tower knows that the boats are chartered, should be imposed upon the owner without a previous understanding to that effect. Knowledge that the boat was chartered, and the necessary implication in such a business as this, that the charterer and not the owner should pay for towages, as well as Quigly's testimony to the ordinary practice to collect of the charterers only, and the libelant's dealing with Scott alone and not with any master of the boat, are sufficient to prevent the libelant's recovery. The case is similar in principle to that of The Kate, 164 U. S. 458, where it was held that no lien would exist merely upon dealings with the charterer, even if the credit were given to both the charterer and to the vessel, because the charterer had no authority to bind the vessel. In this regard I do not think towages in the usual course of the charterer's business, and not arising in any exceptional emergency, stand in any better position than repairs and supplies. The same rule was reaffirmed still more pointedly in The Valencia, 165 U. S. 264, where the supply men had no express knowledge of any charter but had knowledge of facts sufficient to put them on inquiry."

In *The City of Milford,* 199 Federal Reporter, 956, 959-60, it was said:

"The general purpose of this enactment is plain. Hereafter when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the materialman knows nothing about the authority of the person in possession of the ship, except that he visably has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person intrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If, under such circumstances, a materialman furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say:

'I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them; but I did not know whether that which I had heard was true or not. I could easily have made inquiries, and, if I had inquired, I would have found out the truth, but I did not do so.'

He who is so careless of other men's rights will find that his own will be determined, not by what he absolutely knew, but by what it was in his power to find out, if he had acted with ordinary and reasonable care. And so the act provides that nothing in it shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of

the terms of the charter party, or agreement for sale of the vessel or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor.

Before this proviso can have any application, something must have occurred to put the furnisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of the vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty or inquiry as to whether the person who has the management of the ship has the right to pledge its credit.

* * * * * *

It is neither necessary nor appropriate to attempt to suggest what circumstances will be sufficient to put a supply man upon inquiry. In this case it is not contended that there were any. Moreover, the agent of the claimant was on the vessel, knew that all these supplies were being furnished to it, himself ordered an appreciable portion of them, and did nothing to warn those who were supplying them that the ship was not to be bound for them."

Is there any distinction between the instant case and the authorities we have cited. We submit that Rudbach did not act in good faith when he decided in his own mind that he would

hold the ship for supplies which he had been told he would need sell, if at all, upon the credit of the charterers. He was not compelled to sell his goods. He did sell them, and for some he was paid by the charterer. He has a claim against the charterer for the balance. He has no just claim against the ship. He was warned before he parted with any of his goods. After failing to collect from the charterer, he is acting in bad faith in attempting to hold the ship.

THE CHARTER-PARTY BY REQUIRING THE CHARTERER TO HOLD THE OWNER HARMLESS FROM LIENS UPON THE VESSEL, DOES NOT CONCEDE TO THE CHARTERER THE AUTHORITY TO BIND THE VESSEL FOR THE SUPPLIES FURNISHED BY LIBELANT.

Obviously, this requirement was inserted in the charter-party to protect the owner, not a stranger. Particularly not a stranger who, like Rudbach, never *saw* the charter-party or in anywise depended upon it. It seems to us perfectly patent that the requirement was inserted as a result of the fact that the owner demanded protection against a stranger; a stranger, such as the one in this case, who, in bad faith, might seek a lien upon the vessel.

The precise point was considered and decided by the Circuit Court of Appeals of the Seventh Circuit in *Northwestern Fuel Co. v. Dunkley-Williams Co.,* 174 Fed. 121, and in that case the court said (p. 124):

"The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of $1000 we deem without merit. Appellee was entitled under the agreement to receive the Petoskey free of all liens. The $1000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of the appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility. It is difficult to understand how an owner could protect himself against parties furnishing supplies without using due diligence to ascertain the facts, unless it be required that he do as appellant suggests: Paint a notice upon the vessel—a method which does not commend itself to our judgment. This opinion is not at variance with that of Judge Putnam in the case of The Surprise, 129 Fed. 873, 64 C. C. A. 309, since here we find that libelant was put upon notice of the charter party."

And upon the trial of the cause, the District Judge said (pp. 126, 127):

"A persuasive argument is made by libelant as to the construction and effect of the peculiar clause in the charter-party—'and shall not permit her to be in debt for amounts constituting a lien upon her for more than the sum of one thousand dollars, at any time.' It is contended that if the libelant, being put upon inquiry, had examined the charter-party, he would have been justified in construing this clause forbidding the charterer to incur liens exceeding $1000 in amount as an implied consent to liens up to that amount, and that, as there is no evidence that any liens had accrued up to the time this coal was furnished,

> it could not be held a fraud upon the owners to rely upon the security of the vessel within the limits thus fixed by the owners. This argument is specious, but not sound. The clause in question was inserted for the protection of the owner as against the charterer. It required the payment of claims by the charterer before they exceeeded the limit. It is calculated to enforce the duty imposed by the antecedent clause. It was not inserted for the benefit of third parties as a foundation of a claim upon the vessel. The real question for the furnisher to determine primarily was who was bound to pay the coal bills. This question is effectually set at rest by the language of the seventh article of the charter-party: 'That for and during the life of this charter-party, the said party of the second part (the charterer) shall promptly pay all of the running and operating expenses of said steamer'. On learning of this obligation on the part of the charterer, the duty of the libelant was plainly to deal with the charterer, and by that course only could it keep faith with the owners."

In *The Surprise* (supra) the court indicates that the way in which an owner should protect himself against a lien is the very way which the trial judge held in this case results in subjecting the ship to the lien. In *The Surprise* the court said (p. 880):

> "If, in these respects, there is any violation of any agreement, express or implied, between owners and charterers, the owners must protect themselves, as was done in the case at bar, by taking an obligation with a surety, or by terminating the charter for a breach of the terms thereof."

In *The City of Milford,* 199 Fed. 956, the charterer was required, as in the instant case, to hold the owner harmless from liens against the vessel. In fact, the charterer was required to give a bond conditioned to protect the claimant by reason of liens or other claims against the ship arising through or under the charterer. Yet this was not said to indicate that the charterer had authority to bind the vessel. The court decided that a lien would prevail because no notice of the terms of the charter-party was brought even constructively to the libelant.

And in *The Golden Rod,* 151 Fed. 6, the lien was not allowed, notwithstanding that the charterer had "engaged to furnish a bond to protect against any liens for seamen's wages, repairs, supplies, etc."

Finally, upon this proposition we submit that the particular provision of the charter-party from which the learned District Judge drew his inference, should be deemed to refer to such liens as those for seamen's wages, for which a vessel would be responsible irrespective of the agreements of the owner and charterer *(The Gen. A. J. Dumont,* 158 Fed. 312, 314).

EVEN IF IT COULD BE HELD THAT THE TERMS OF THE CHARTER-PARTY WHEN READ LITERALLY, FAIL TO DEPRIVE THE CHARTERER OF AUTHORITY TO BIND THE VESSEL, YET THE TERMS UPON WHICH THE VESSEL WAS IN FACT HELD, AS EVIDENCED BY MR. SOOY'S LETTER TO MILLS, THE CHARTERER'S AGENT, AND HIS ACQUIESCENCE AND THE ACQUIESCENCE OF THE CHARTERER, HIMSELF, THEREIN, DEPRIVED THE CHARTERER OF AUTHORITY TO BIND THE VESSEL; PARTICULARLY IN VIEW OF THE FACT THAT A CHARTER-PARTY MAY BE ORAL, AND THE FURTHER FACT THAT THE LIBELANT WAS NOTIFIED THAT THE VESSEL WAS UNDER CHARTER AND WOULD NOT BE LIABLE.

There is no doubt that Mills was the agent of Levick, the charterer. We submit his testimony on that point (particularly page 96 of Apostles).

> "Q. After Levick appeared upon the scene of action did you act at all for Captain Roberts and Mr. Sooy in connection with the 'South Coast'?
>
> A. No, I did not. You mean in any capacity whatever?
>
> Q. In connection with the 'South Coast'?
>
> A. No, I did not."

There is no doubt that Mr. Sooy wrote the letter to Mills which is set forth in the record (pp. 78-79):—

> "June 26, 1915.
>
> Mr. E. A. Mills
> Pacific Wharf & Warehouse Co.
> East San Pedro, Cal.
>
> Dear Sir:
>
> Under the provisions of charter and option given by the South Coast Steamship Co., the owners of the S. S. South Coast, to Mr. Levick, the repairs now being made to this vessel are

to be made for the credit of Mr. Levick and not upon the credit of the vessel. This is also true as to any supplies that may be furnished the vessel or on account of any labor furnished thereto. Carrying out the agreement with Mr. Levick *all* of the persons, firms or corporations furnishing supplies, labor or materials to said vessel are to be notified either by you or ourselves that they cannot hold the vessel for any supplies, labor or materials furnished the said vessel. Upon receipt of this letter you will therefore please notify all persons furnishing said supplies, labor or materials, to the vessel that they must look to Mr. Levick and not to the vessel for payment of same. Please notify me in answer to this that you have done as requested and let me know the names of the people whom you have notified. I would rather, on account of relationships, have you notify these people than for us to write the letters because if we wrote it it might in some way injure Mr. Levick and this I do not wish to do. I have just been informed by Mr. Levick and Mr. Oliver that he has arranged for insurance on the vessel after repairs are made. Thanking you in advance for this courtesy, I am

Very truly yours,"

This is found as a fact by the court (p. 121 of Apostles).

There is no doubt that Mr. Sooy warned the libelant, as he testified, before any of the supplies here involved were delivered (pp. 72-73 of Apostles):—

"Q. Will you account, please, the conversation you had with Mr. Rudbach on that occasion?

A. In substance, I can; I cannot, of course, give the exact words of it, but I said to Mr.

Rudbach, 'You have furnished an order of goods here to the steamer South Coast'. He said, 'Yes, here they are'; they were laid out in a run-way, a sort of alley-way in his store there, as I recall it, between two streets, and I said, 'Do you understand from Captain Roberts that the ship is not responsible for these bills?' He said, 'Yes, but Captain Roberts tells me that he is going to pay me out of the money that he gets from Levick'. I said, 'Captain Roberts is the President of the South Coast Steamship Company and I am Secretary and attorney for it, and Captain Roberts has just told me', and that was the way Captain Roberts introduced me to Mr. Rudbach, and I said, 'I do not want any question at all about this bill or about any other bills that may be incurred on behalf of the "South Coast", and I have come here particularly to tell you that.'

Q. Was anything further said?

A. Then Roberts said that Levick would be in San Pedro on that afternoon, with the understanding that he was to turn over the money to Roberts, and that Roberts would pay Mr. Rudbach.

Q. That was stated at that time, was it?

A. That was stated at that time.

Q. As a matter of fact, do you know whether Captain Roberts at that time occupied some position on the vessel?

A. He was Captain of the ship.

Q. Employed by whom?

A. By Levick.

Q. For what purpose, for what voyage?

A. For the purpose of going to Ensenada and return.

Q. Just for the one voyage?

A. Just for the one voyage."

Rudbach disputes this; but the court believed Mr. Sooy and not Mr. Rudbach (Opinion p. 121 of Apostles).

"He was also warned by Mr. Sooy, one of the owners, not to deliver any goods on the credit of the ship."

There is no doubt that Levick, the charterer, acquiesced in the letter which Mr. Sooy sent Mills (testimony of Mills, pp. 94-95 of Apostles):

"Q. Now, do you remember having received a letter from Mr. Sooy concerning the payment of bills?

A. Yes, that was several days after the boat had arrived.

Q. Several days after?

A. That was after Captain Roberts had told me the same thing.

Q. Captain Roberts told you the same thing?

A. I also received the same information from Mr. Levick that Levick & Oliver were to be responsible for the bills."

There is no doubt that the libelant had notice. The court found (p. 121 of Apostles):

"Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ship's account, and had also been advised that Levick and Oliver would pay the bills."

There is no doubt that a charter-party may be oral.

The J. Doherty, 207 Fed. 997, 1001;

The H. C. Grady, 87 Fed. 232;

James v. Brophy, 71 Fed. 310.

Consequently, we submit that the terms upon which the vessel was held are not those delineated

literally by the charter-party, but those which the parties believed and declared were the true facts of the case; as evidenced not alone by the formal charter-party, but by all of their writings and transactions.

Raymond v. Tyson, 17 How. 53;
James v. Brophy, 71 Fed. 310;
Barreda v. Silsbee, 21 How. 146.

And as we have frequently pointed out, the libelant cannot complain. He never saw the formal writing and he never sought to see it.

IV.

THE LAW APPLICABLE TO THIS CASE WAS NOT ALTERED BY THE ACT OF JUNE 23, 1910 (36 Stat. L. 604).

This proposition coincides with the conclusion for which appellant has contended throughout this cause, and by the same token, it is in conflict with the position which libelant took. Libelant believed that his cause could not prevail if it were concluded that the Act of 1910 did not ordain a principle of law different from that which prevailed theretofor. In his brief in the Circuit Court of Appeals, libelant said:

> "There is some authority for the proposition, contended for by this appellant, in a few early cases decided long before the enactment of the Federal statute giving a lien on a vessel for supplies furnished to it". (Appellee's brief, p. 2.)

> "The conclusion is, therefore, irresistible that whatever the law may have been prior to June 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens is immaterial under the Federal Act of said date." (Pages 7 and 8 of appellee's brief.)

Notwithstanding libelant's contention that the law was so altered by the Act of June 23, 1910, as to render immaterial, knowledge on the part of the supply-man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, the court held that the Act of 1910

> "was intended as declarative of maritime law respecting the subject, as it existed prior to the enactment. It was not designed to ordain any new or different principle of law."
>
> (Transcript of Record, p. 167.)

In this respect the court's opinion coincides with the conclusion reached by the other courts of the country.

The Sinaloa, 209 Fed. 287, 288;
The Dredge A, 217 Fed. 617, 628-9;
The Yankee, 233 Fed. 919, 925-6.

Any other conclusion would disregard these two principles:

(a)—

> "The presumption is that the legislature does not intend to change or modify the law beyond what it declares in express terms, or by unmistakable implication."
>
> (*The Dredge A* (supra).)

(b)—

"It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris,* and cannot be extended by construction, analogy or inference."

(*The James T. Furber,* 157 Fed. 126, 129.)

Pratt v. Reed, 19 How. 359, 361;
The Lottawanna, 21 Wall. 558;
The Aurora, 194 Fed. 559;
The Yankee Blade, 19 How. 82;
The Dixie, 236 Fed. 607, 608.

THE TERMS OF A CHARTER-PARTY OR AGREEMENT FOR THE SALE OF A VESSEL ARE NOT THE EXCLUSIVE SOURCE OF A CHARTERER'S INABILITY TO CREATE LIENS UPON THE VESSEL.

The statute (Act of June 23, 1910) specifically provides that there shall be no lien if the furnisher knew or could have ascertained by the exercise of reasonable diligence that *for any reason,* the person ordering the supplies had no authority to bind the vessel therefor. The furnisher in the instant case, had been warned that the owner and the charterer had agreed, either by the terms of the written charter-party or by some other contract, that the vessel should not be held. Before he furnished the goods he had been informed of this fact by the owner (Apostles 72), the charterer (Apostles 36-37) and the charterer's agent (Apostles 95, 97). As the trial court found:

> "So that if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given."

The merchant did not depend upon what the learned trial Judge found to be a defect in the charter-party; because the merchant never saw the charter-party or requested to see it (Apostles pp. 44-45). All he knew was what he had been told by the owner, the charterer and the charterer's agent, viz., that the charterer and not the vessel would be liable for the provisions.

Primarily we are considering a question of agency. The master is assumed to be the agent of the owner for the purpose of charging the vessel with a lien under certain circumstances. If the master has not that authority then he simply "is without authority" and "unalterably inhibited" from assuming an authority which he has not.

We submit that if the charter-party by its terms discloses that the master "is without authority", as it does in the instant case, it is just as strong an expression, for the purpose, as the direct one that he is "unalterably inhibited" from creating a lien on the ship, and a far cry from meaning the opposite, by implication.

It was the construction placed upon the charter by the charter-parties themselves, and the charter should be construed with a view of sustaining and giving effect to its terms and not the opposite.

The learned Judge failed, we respectfully submit, to accord the necessary, or, for that matter, any consideration to the words *"or for any other reason"* found in the statute.

The statute specifically provides that a furnisher of supplies shall have no lien if he knew or by the exercise of reasonable diligence could have have ascertained that the person ordering the supplies was without authority to bind the vessel therefor; because:

(a)"of the terms of a charter-party",
(b) of the terms of an "agreement for sale of the vessel, or"
(c) "for any other reason".

(Act of June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1913, Sec. 7787.)

Notwithstanding the words *"or for any other reason"*, appearing in the statute, the learned District Judge limited the application of the statute to the terms of the charter-party. This is obvious from the following excerpt from the court's opinion:

> "And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor."

In our assignment of errors, we specified particularly that the court erred in this interpretation of the statute.

We submit that the effect of the interpretation is to eliminate from the operation of the statute, cases which the Congress, by the use of definite words, included in the operation of the statute. We will proceed now to notice some of those cases:

We have already referred at length to *The Underwriter.*

In *The Valencia,* 165 U. S. 264, it was held:

> "A maritime lien on a vessel is not created by supplying coal to it on the order of a charterer, without any order or procurement of the master or his expressed consent, where the charterer was required by the charter to provide and pay for the coal, and had an office at the port of supply so that the party providing it could easily have ascertained the ownership of the vessel and the relation of the charterer to it, although he acted in fact on a belief that the vessel was responsible."

What does one see when he reflects the light of that decision upon the facts of the present case? In each, the charterer was required to pay for the supplies. In each, the charter-party failed to specifically provide that the charterer should have no power to permit liens to attach. In each, the merchant knew the owners. In each, the merchant could have discovered the precise terms of the charter-party (in fact the merchant was informed of them in the instant case). In each, the merchant looked to the vessel.

There is, of course, this difference in the two cases. In *The Valencia,* the supplies were ordered by the charterer himself, whereas in the instant

case the supplies were ordered by the master (except in the case of the items aggregating $361.38, evidenced by libelant's "Exhibit 6", which were ordered by Mr. Mills (Apostles pp. 26-27) the charterer's agent (Apostles p. 96).

But this difference does not affect the point which we now urge; namely, that specific provisions in the charter-party, forbidding the charterer to bind the vessel, are not the exclusive criteria; that even though a charter-party be silent upon the subject of liens, yet a charterer can not bind the vessel for goods ordered by him if the charter-party required him to furnish the supplies, and the furnisher had notice thereof.

Thus we have found one illustration of the *"any other reason"* which the Congress had in mind and which, we respectfully submit, the learned District Judge ignored.

And in this connection has there not been a breach of a well recognized canon of statutory construction? It would seem so from a consideration of the decision of Judge Dooling, himself, wherein, in interpreting the Act of 1910, he said in *The Sinaloa,* 209 Fed. 287, 288:

> "The apparent intent of the act was to relieve those persons who formerly would have had a lien if credit had been given to the vessel from the necessity of alleging and proving that credit had been so given. *The purpose does not seem to have been to create a new class of liens, or liens for services which had been theretofore determined not to be maritime, but only to deal with certain matters that had*

always been recognized as cognizable in admiralty."

A similar conclusion follows a consideration of the Act of 1910 in *The Dredge A.*, 217 Fed. 617, 628-9, in which the court said:

> "This is in accordance with well settled canons of statutory construction by which courts are guided in ascertaining the intention of the legislature. 'The presumption is that the legislature does not intend to change or modify the law beyond what it declares in express terms, or by unmistakable implication'. 26 Am. & Eng. Enc. 649.
>
> Mr. Justice Strong in Shaw v. Railroad Company, 101 U. S. 557, says:
>
> 'No statute is to be construed as altering the common law further than its words import. It is not to be construed as making an innovation upon the common law which it does not fairly express.'"

In *The Yankee*, 233 Fed. 919, 925-6, the Circuit Court of Appeals for the Third Circuit said:

> "But it is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. The Patapsco, 80 U. S. (13 Wall.) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred 'when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, agreement for sale of the vessel, or for any other reason, a

person ordering repairs, supplies or other necessaries, was without authority to bind the vessel therefor.' *This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States.* The Kate, 164 U. S. 458; The Valencia, 165 U. S. 264. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies or the presumptions of the law."

Beyond the error which we submit resulted from a failure to so interpret the statute that no change should be deemed to have been worked except the change expressly declared, it seems to us that the interpretation placed upon the statute by the learned trial Judge is peculiarly unwarranted, in view of the fact that his interpretation unnecessarily *extends* a class of liens which are disesteemed because of their secret nature.

In *Pratt v. Reed,* 19 How. 359, 361, it was said:

"These maritime liens in the coasting business and in the business upon the lakes and rivers are greatly increasing; and, as they are tacit and secret, are not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of the law in this respect will tend to perplex and

embarrass business, rather than furnish facilities to carry it forward."

Mr. Justice Bradley in delivering the opinion of the court in *The Lottawanna,* 21 Wall. 558, said:

> "It may be added that the existence of secret liens is not in accord with the spirit of our commercial usages."

Judge Sanborn in *The Aurora,* 194 Fed. 559, said:

> "A maritime lien is a privileged one, secret in character overriding all other liens or transfers, possibly operating to the prejudice of creditors or purchasers without notice. In the nature of things it is *stricti juris,* and must be shown to exist."

Judge Hale in *The James T. Furber,* 157 Fed. 126, 129, said:

> "It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris,* and cannot be extended by construction, analogy or inference."

See, also:

The Yankee Blade, 19 How. 82;
The Dixie, 236 Fed. 607, 608;
The Dredge A., 217 Fed. 617, 629;
Taylor v. Weir, 110 Fed. 1005;
The Havana, 87 Fed. 487, 488.

Besides the character of cases indicated by *The Underwriter* (supra) and *The Valencia* (supra), there are many others which fall within the description "for any other reason", adopted by the Congress in the Act of 1910, and in which it must

be held under the rules of statutory construction, the Congress intended no lien could attach to a ship for supplies furnished to it. One of these is the case in which there is BAD FAITH on the part of the furnisher of the supplies. Such a case is *The Kate,* 164 U. S. 463, in which it is said (pp. 463-465, 471):

> "We are of opinion that, as the libelant knew, or under the circumstances, is to be charged with knowledge, that the charter party under which The Kate was operated, obliged the charterer to provide and pay for all the coal needed by that vessel, no lien can be asserted under the maritime law for the value of coal supplied under the order of the charterer, even if it be assumed that the libelant in fact furnished the coal upon the credit both of the charterer and of the vessel. As the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it. His want of authority to charge the vessel for such an expense was known or could have been known to the libelant by the exercise of due diligence on its part. Under the circumstances, the libelant was not entitled to deliver the coal on the credit of the vessel, and its attempt to hold the vessel liable is in *bad faith* to the owner. The law cannot approve or encourage such an attempt to wrong the owners of the vessel. Neither reason nor public policy forbade the owner and the charterer from making the arrangement evidenced by the charter party of December 15, 1892. The master of a ship is regarded as 'the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries furnished for her use. This rule is established as well

upon the implied assent of the owners as with a view to the convenience of the commercial world'. The Aurora, 1 Wheat. 96, 101. 'The vessel must get on,' and 'the necessities of commerce require that when remote from the owner, he (the master) should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests'. The St. Jago de Cuba, 9 Wheat. 409, 416; The J. E. Rumbell, 148 U. S. 1. When, therefore, supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. *But no such necessity can be suggested, and no such reason urged, in support of an implied lien for supplies furnished to a charterer, when the libelant at the time knew, or by such diligence as good faith required could have ascertained, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken, as between itself and the owner, to provide and pay for all supplies required by the vessel.*

There are many cases in which the recognition or rejection of liens under the maritime law has depended upon the diligence of parties in ascertaining the limitations imposed by the owners of vessels upon the authority of masters. *These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel.* As they throw light upon the present inquiry, it is proper to refer to some of them.

In Thomas v. Osborn, 19 How. 22, 31, 32, the court said that all the commentators agree 'that if one lend money to a master, knowing he has not need to borrow, he does not act in good faith, and the loan does not oblige the

owner. Valin, art. 19, Emerigon, Contrat a la Grope, chap. 4, Sec. 8, and the older commentators cited by him. Boulay-Paty, Cours de Droit Com. tit. 1, Sec. 2; Boulay-Paty, Cours de Droit Com. tit. 4, Sec. 14; and see the authorities cited by him in note 1, page 153 * * * 'If,' the court said, 'the master has funds of his own which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And *if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel'*. In the same case it was said: 'We are of opinion Loring & Co. (merchants who had given a credit to Leach, to whom had been committed the entire possession, command, and navigation of the vessel) had no right to lend Leach money or furnish him with supplies on the credit of the ship, and cannot be taken to have done so. Our opinion is, that inasmuch as the freight money earned by the vessel was sufficient to pay for all the needful repairs and supplies, and might have been commanded for that use, if they had not been wrongfully diverted, no case of actual necessity to encumber the vessel existed; and as Loring & Co. not only knew this, but aided Leach to divert the freight money to other objects, they obtained no lien on the vessel for their advances'.

In The Grapeshot v. Wallerstein, 9 Wall. 129, 136, the court, observing that courts of admiralty do not scrutinize narrowly the account against the ship, said: 'They will reject, undoubtedly, all unwarranted charges; but upon proof that the furnishing (of supplies and materials) was in good faith, on the order of the

master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported; unless it is made to appear affirmatively that the credit to the ship was unnecessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the materialman knew, or could, by proper inquiry, have readily informed himself of the facts'.

So, in Hazlehurst v. The Lulu, 10 Wall. 192, 201-204, the court said: 'Good faith is undoubtedly required of a party seeking to enforce a lien against a vessel, for such a claim (for advances to the master, or for repairs or supplies furnished at his request) but the fact that the master had funds which he ought to have applied to that object is no evidence to establish the charge of bad faith in such a case unless it appears that the libelant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry within the principles of law already explained. Express knowledge of the fact that the master had sufficient funds for the purpose is not necessary to maintain the charge of bad faith, as it is well settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the in-

quiry ought to have been made.' Again: 'Viewed in any light, it is clear that necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship when lying in port or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.'

In The Emily Souder v. Prichard, 17 Wall. 666, 671, the court said that the presumption of law in the absence of fraud or collusion, where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage or to pay harbor dues, or for pilotage, towage and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners, 'can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry'.

In The Sarah Starr, 1 Sprague, 453, 455, the court said that 'in giving credit to the vessel and owners, the materialman should act in good faith, and he would not be deemed to act in good faith if he knew that the master had funds wherewith to pay for the supplies, or, if facts were known to him which would create

suspicion and put him upon inquiry, when such inquiry would have lead to knowledge that the master had funds, and had no right, therefore, to obtain supplies on credit. That is, if the materialman had knowledge that the master was acting in bad faith towards his employers, or knew of circumstances which ought to admonish him to make inquiry that would have lead to such knowledge, then he would be affected with bad faith, as colluding with the master, and aiding him in violating his duty to his owner. But if the materialman had no reason to suppose that the master was violating his duty in obtaining a credit, he might, upon request of the master, trust to the vessel and owners, and a lien would thereby be created'.

The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libelant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required and he should apply in the purchase of needed supplies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libelant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts.

If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the

vessel for such supplies, much less one is recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.

* * * * * *

If the libelant in this case had furnished the coal upon the order of the master, and without knowledge or notice that the vessel was operated under a charter-party, or if coal had been furnished upon the order of the charterers as well as upon the credit of the vessel, under circumstances which did not charge libelant with knowledge of the terms of the charter-party; but charged it only with knowledge of the facts that the vessel was being operated under a charter party, a different question would be presented."

The part which the decision in *The Kate* (supra), plays in the solution of the present problem cannot be better illustrated than by the following observations concerning the Act of 1910, found in the opinion in *The Oceana,* 233 Fed. 139, 146:

"The act does not mean that the furnisher shall not have the right to rely upon the authority to bind the vessel presumed to exist in the officers and agents specified in the second section. It is only when he knows that such officers or agents do not have the requisite authority, or under the circumstances is put upon inquiry as to their power, that the presumption becomes inoperative. There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative

knowledge of such restriction, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority. *The pharse 'knew or by the exercise of reasonable diligence could have ascertained' was adopted from The Kate, 164 U. S. 170, and was used in the Act of Congress to make it clear that, if the furnisher know of the existence of a charter party or of an agreement for the sale of the vessel, he is put upon inquiry as to its terms, and cannot excuse himself by denying ignorance of the terms, should it turn out that the charterer or agreed purchaser had undertaken to furnish the vessel at his own cost.*"

See, also,

The Yankee, 233 Fed. 919, 925-6.

Thus, we submit, that far from having altered the rule laid down in *The Underwriter* (supra), the Congress specifically recognized that rule and declared it to be an accurate statement of the law, by adopting the language of *The Kate* (supra); language upon which Judge Lowell largely based his conclusion in *The Underwriter.*

If the law stands as announced in the decision of the Circuit Court of Appeals in this case, it will make it impossible for an owner to safely charter a vessel, and will tend inevitably to restrict the operation of our increasing mercantile marine, as none, except the very strong financially could obtain a charter.

Independent enterprise will be discouraged, and strong financial combines result.

We respectfully submit that the decree should be reversed and the libel dismissed.

Dated, San Francisco,
October 8, 1919.

MARCEL E. CERF AND C. H. SOOY,
Proctors for Appellant.

OLIVER DIBBLE,
Counsel.

FILED
OCT 31 1919
JAMES D. MAHER,
CLERK.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1919

No. 68

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,

Appellant,

vs.

J. C. RUDBACH,

Appellee.

REPLY BRIEF FOR APPELLANT.

MARCEL E. CERF AND C. H. SOOY,
Proctors for Appellant.

OLIVER DIBBLE,
Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No.

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,
Appellant,

vs.

J. C. RUDBACH,
Appellee.

REPLY BRIEF FOR APPELLANT.

As we pointed out in our opening brief, the language used in the charter-party in depriving the charterer of the authority to create a lien on the vessel is just as efficacious for the purpose as would be language used "unalterably inhibiting" the creation of a lien. How strong must the language be?

Must it invoke a penalty? The appellee admits (Appellee's Brief, page 1) that if the charter-party "contained a clause prohibiting the charterers from giving liens on the steamship 'South Coast' the appellee would not * * * be entitled to a lien" and then argues that appellant claims a limitation on the *presumed* right of the charterer should be implied.

The prayer for the indulgence of presumptions is on the part of the appellee. The decision of the courts with respect to notice is in favor of the appellant, and therefore any *right to a lien* given on the state of facts existing and found in the instant case would necessarily be given only by the extension of that right by inference.

Judge Hale in *The James T. Furber,* 157 Fed. 126, said:

> "It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris,* and cannot be *extended by construction, analogy or inference.*"

See, also:

The Aurora, 194 Fed. 559;
The Yankee Blade, 19 How. 82;
The Dixie, 236 Fed. 607;
The Dredge A, 217 Fed. 617;
Taylor v. Wier, 110 Fed. 1005;
The Havana, 87 Fed. 487.

On the state of facts shown to exist in this case the charterer has no *presumed* right to give a lien

on the vessel, and such construction given the charter-party results in an absurdity.

We pass over the contentions of counsel that the cases cited by the appellant, to wit:

The Oceana, 233 Fed. 139;
The Surprise, 129 Fed. 873;
The J. Dogherty, 207 Fed. 997,

sustain his contention instead of that of the appellant. The cases speak for themselves, and the counsel starts with a false premise when he argues (Appellee's Brief, pages 7-8).

> "Thus the legal presumption in favor of a lien *from a given state of facts* would be defeated by a further legal presumption from the same state of facts. The conclusion is, therefore, irresistible that whatever the law may have been prior to June 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, is immaterial under the Federal Act of said date and that nothing can defeat his lien except affirmative proof that *he knew, or ought to have known,* that the charter-party *prohibited* the charterer from giving a lien on the vessel." (Italics ours.)

We submit that the charterer *knew* that the supply man was notified by Mr. Sooy expressly that "under the provisions of the charter * * * all persons are to be notified * * * that they cannot hold the vessel for any supplies", and that fact destroys any legal presumption in favor of a lien.

That is the way the charter was construed when the notice was given, and the courts rightly held

that *the law applicable to this case was not altered by the Act of June 23, 1910,* and we urge in all seriousness that the notice and language of the charter-party is the equivalent of an "express prohibition" in the charter and affirmative proof that the supply man knew and that the only way in which appellant's rights can be defeated is by a forced construction of the charter-party an extension by such construction of this secret lien contrary to the general principle of maritime law and a consummation reached resulting in an anomaly.

There is nothing in the case of *"The Bud III"*, 250 Fed. 918, cited by counsel (Appellee's Brief, pages 15-16) which supports counsel's contentions, or which is contrary to those of appellant.

The court in that case rightly gave a lien because the vessel *was in the possession of the purchaser of the supplies under a contract of sale,* and therefore he had such equitable rights in her as to be regarded as the owner.

There was no question of *notice* involved in that case and the language of the court in holding that Congress intended to give a lien on a vessel for necessaries furnished to it in her home port as well as in a foreign port is clearly inapplicable here.

As we view the situation, the court did not in the case of *The Surprise* (supra) overrule the holding in *The Underwriter* and that is still authority in the instant case, and that the Act of June 23, 1910, did not alter the law applicable to the case at bar,

and that a provision in a charter party that the charterer will hold the owner harmless from any lien asserted for supplies furnished the ship is *not* tantamount to an assertion that such liens may be asserted, but equivalent to an inhibition in the charter-party against the charterer creating any liens on the vessel.

Such language should be construed to give effect to its terms, in line with the construction given to it by the charter-parties themselves, "and not for the solace of those furnishing supplies without reasonable investigation as to responsibility." (117 Fed. 121)

Dated, San Francisco,
October 22, 1919.

MARCEL E. CERF AND C. H. SOOY,
Proctors for Appellant.

OLIVER DIBBLE,
Counsel.

Due service and receipt of a copy of the within is hereby admitted this_____day of October, 1919.

_____

Proctor for Appellee.

NOV 1 1919
JAMES D. MAHER,
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No. 68

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,
Appellant,

vs.

J. C. RUDBACH,
Appellee.

BRIEF FOR APPELLEE.

IRA S. LILLICK,
Proctor for Appellee.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No.

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,
Appellant,

vs.

J. C. RUDBACH,
Appellee.

BRIEF FOR APPELLEE.

It is admitted by the appellee that if the charter party in question contained a clause prohibiting the charterers from giving liens on the steamship "South Coast", the appellee would not, under the rulings of the District Court and Circuit Court of Appeals that he had notice of the terms of the charter, be entitled to a lien for the supplies furnished to the vessel by him. The charter party contains

no such express limitation on the legally presumed right of the charterer to give liens on the vessel, but the appellant claims that such a limitation should, necessarily, be implied from the provision in the charter that the charterer should pay for all supplies, repairs, and other charges against the vessel. This, in our opinion, does not necessarily follow as the one is not in the least inconsistent with the other. Who shall pay for the supplies is one question and whether or not a lien shall attach to the vessel until it is paid, is another entirely independent of the first.

There is some authority for the proposition, contended for by this appellant, in a few early cases decided long before the enactment of the Federal statute giving a lien on a vessel for supplies furnished to it. An examination of these early cases, however, will convince the Court that the rulings there made can not prevail today against the modern law on this subject which we will hereafter cite. The early cases, however, the "Kate", 164 U. S. 458, 41 L. E. 512, and the "Valencia", 165 U. S. 264, 41 L. E. 710, both cited and followed in the case of the "Underwriter", 119 F. 713, are relied on by the appellants. We cannot better show to the Court the most uncertain state of the law, in this connection, at that time than by referring to the excellent review of the authorities in the latter case by Judge Lowell of the District Court for the Northern District of Massachusetts. The situation was by no means clarified by the local statutes under which

most of these cases were decided, but waiving any questions raised by the state statutes, Judge Lowell, on page 751, shows what the various conditions are surrounding a lien for supplies furnished to a vessel under the general admiralty law and the difficulty of enforcing such a lien. On page 755, the Court explains the basis of the decisions in the "Kate" and the "Valencia" as follows:

> "(b) On the other hand in the 'Valencia', 165 U. S. 264, 271, 17 Sup. Ct. 323, 325, 41 L. Ed. 710, it was said that: 'In the absence of an agreement, express or implied, for a lien a contract for supplies made directly with the owner, in person, is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived'. * * * And the extended discussion in the 'Kate', 164 U. S. 458, 465-470, 17 Sup. Ct. 135, 41 L. E. 512, treats the lien as created by authority confided in the master by the owner. This is to say that the nonexistence of the lien in the presence of the owner arises from a want of authority in the master to find the vessel when the owner himself is present."

It is true that the "Underwriter" does hold that it is only when a vessel is in a port of distress that a supply man will be given a lien, where the terms of the charter party provide that the charterer shall pay for the supplies, but we think that the proctors for appellant are in error when they apparently claim that that case was affirmed in the "Francis J. O'Hara, Jr.", 229 F. 312. The terms of the charter party, if any, in the latter case are not set out, and, in all probability,

there was no charter party. The Court found as a fact that the master was without authority to give a lien on the vessel, citing a case decided by the state Court, Rich v. Jordan, 164 Mass. 127, 41 N. E. 56, which in turn cited three other cases decided by the Courts of that state: Uran v. Fletcher, 1 Gray 125; Baker v. Haskins, 5 Gray 596; Tucker v. Stimson, 12 Gray 487. It seems that all of those local cases were decided under a rule peculiar to the state of Massachusetts, that is, that the master is prohibited from giving a lien on the vessel where the owner has given over the entire possession and control of the vessel to a third party.

Whether in the O'Hara case the denial of a lien was based on a local rule having its inception in a local custom of small fishing craft, or an express limitation of authority in the agreement between the vessel owner and the charterer, is not material, the principal point being that the lien was *not* denied simply because the charterer had agreed to pay for the supplies. This conclusion is further fortified by the Court citing the "Eureka", 209 F. 373, where the charter party contained an express limitation of authority, and observing that the slightest inquiry would have disclosed that the master had no authority to buy on the vessel's account. It seems also that the Court makes a distinction between an agreement to pay for supplies and a limitation of authority to give a lien on the vessel for supplies, and, that the one does not necessarily include the other. The "Francis J. O'Hara", 229 Fed. 314:

> "Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to these important facts."

The holding in the "Underwriter", above stated, has been expressly overruled by the Circuit Court of Appeals in the case of the "Surprise", 129 F. 873. In that case supplies were furnished to a vessel under charter and the vessel was held liable therefor. It was contended by the claimant and owner that the libelant was informed of the charter party and that under the terms of the same, the charterers were bound to pay for the operating expenses including supplies furnished to the vessel and to keep the vessel free from liens. It was held that it is immaterial to the right to a lien for ordinary supplies furnished on the order of the master of a vessel being navigated by a charterer, whether or not there is a formal charter party expressly providing that the charterer shall make all disbursements and protect the vessel from liens, since that is an implied condition of every charter. In holding that a maritime lien existed in favor of the libelant for the supplies so furnished, the Court says on pages 877 and 878:

> "We should also observe that much has been made of the fact that in 'The Kate' and 'The Valencia', there were formal charter parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses, and protect her from

all liens on account thereof. There seems to be an impression that there was something in this fact of special importance; and it has apparently appealed to the legal imagination. It was, however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the parties are the same as those specially provided in 'The Kate' and 'The Valencia'. The charterer is bound to disburse the vessel and protect her from liens, and impliedly agrees to do so, an agreement, as effectual in law as an express one. Moreover, so far as concerns knowledge on the part of a merchant of a charter party or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that the usual obligations pro and con exist; and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact because all the decisions we will hereafter cite relating to vessels where the hull was chartered, bear on 'The Kate' and 'The Valencia', regardless of the fact whether there was a formal charter, or only an oral one without any express statement of the terms thereof.

Coming to the merits of the appeal, it will be found that for each libelant, it is disposed of by 'The Philadelphia', except only so far as a distinction can be made, if one can be, arising from the fact that in 'The Philadelphia' it did not appear that the merchant knew, or ought to have known, that there was a charter, while, at bar, the claimant of the steamer insists that the libelants were expressly informed of the charter and its terms, or were put on notice in reference thereto. The conclusion which we reach will concede that additional element."

The Court observes that, although the vessel was not in a port of distress, the supplies furnished were hand to mouth necessaries and so they were in the case at bar. We prefer, however, not to put the case on that basis, but to regard it from a strictly logical standpoint, as did the judges of the lower Courts.

If then, a supply man, by reason of his having knowledge of the charter party is chargeable also with the knowledge that the charterer is bound to pay the operating expenses of the vessel and keep the same free from liens, it must necessarily follow that Congress in giving a lien for supplies furnished on the order of the charterers, or the master representing them, intended that the further presumed knowledge of the charterer's liability for operating expenses should also be immaterial. Any other interpretation would be most illogical and amount pro tanto to an annullment of the act. For example: A supply man furnishes supplies to a vessel on the order of the master representing the charterers. Under the law (Fed. Stat.) he is entitled to a lien on that state of facts; but says the owner, the law presumes that from your knowledge of the charter, you were also aware that the charterers were bound to pay the operating expenses, and consequently you have no lien. Thus the legal presumption in favor of a lien from a given state of facts would be defeated by a further legal presumption from the same state of facts. The conclusion is, therefore, irresistible that whatever the

law may have been prior to June 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, is immaterial under the Federal Act of said date and that nothing can defeat his lien except affirmative proof that he knew, or ought to have known that the charter party prohibited the charterer from giving a lien on the vessel.

As far as the appellee is concerned, this case should be decided precisely the same as though there was no clause in the charter party requiring the charterers to pay the operating expenses, for it can not possibly be construed into a limitation upon the authority of the charterers to bind the vessel as required by the third section of the Federal Act. The charter party contains no such express limitation, and we have been unable to find any case decided since the statute was enacted which placed the construction upon it contended for by the appellant. On the other hand, the case of "Surprise" (supra) is referred to in Northwestern Fuel Co. v. Dunkley Williams Co., 174 F. 121, 125, and it was admitted that under the rule of that case the lien would have been allowed except for the fact that it appeared from the evidence that credit was given to the charterers and not to the vessel, a circumstance which is no longer material under the Federal statute. The Dunkley Williams case is thus not in conflict with the rulings of the lower Courts herein as maintained on page 55 and elsewhere in

appellant's brief, but is, on the contrary, authority for our contentions herein. Again, the "Surprise" (supra) is quoted with approval in the "J. Dogherty," (1913), 207 F. 997, on page 1001 as follows:

> "By an implied agreement, as effectual in law as if it were expressed, the charterer is bound to disburse the vessel and to protect her from liens. Moreover, so far as knowledge of the charter party on the part of the libelant is concerned, or his duty to inquire, there is no essential distinction, for if the libelant knows that the vessel is chartered, though orally and informally, he must be held to know, as a matter of course, that the usual obligations exist. The 'Surprise', 129 F. 873, 64 C. C. A. 309."

In the "Oceana", 233 F. 139, 146 (affirmed by C. C. A., see 244 Fed. 80) it was said that:

> "There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restrictions, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority."

The words "must be an actual restriction of authority" are significant.

The charges of bad faith on the part of the appellee need not be considered at length here for if, according to the true construction of the charter party, there was in fact no actual restriction of authority, then there could be no bad faith on the part of the appellee in furnishing the supplies to the vessel. Nor are we disposed to attach any

special importance to the clause in the Federal statute: "For any other reason" as that must be interpreted according to the general rule in regard to general words following special words and held to mean "for any other reason similar to the ones set out specially in the statute". The lower Courts unquestionably concluded that the charter party in the present case was the only agreement between the appellant and the charterers which in any way affected the right to give a lien on the vessel, and, consequently, their reference to only the charter party.

It is claimed by the appellant that the letter which it sent to Mr. Mills, set out on pages 75 and 76 of its brief, operated as a subsequent contract or a construction of the former one between the charterer and appellant, and that by its terms the charterers could not purchase supplies on the credit of the vessel. This is on the assumption that Mr. Mills was the agent of the charterers, whereas in fact, he was the agent of the appellant (Apostles, page 61). This is denied by the appellant (page 76), but that is only the conclusion of one of its officers, and a most natural one, in view of the fact that otherwise, it would be prejudicial to the interests of his company. He admits, however, that Mills acted as agent for the South Coast Steamship Company in chartering the vessel to Levick (page 77). It was this same Mills, who was instructed by appellant as its agent to notify those furnishing repairs and supplies to this vessel, that

they must look to the charterers for payment, and not to the vessel. It is true that he failed to correctly advise appellee of the contents of the letter containing these instructions, but that does not, in any way, lessen the value of such evidence as showing that Mills was, in fact, the agent, or at least, the ostensible agent for the appellant in connection with this vessel. Besides, it nowhere appears in the evidence that the charterers agreed to the construction placed on the charter party by the appellant, as set out in the letter to Mr. Mills, who denies having been in the employ of either party (pages 92-93). It therefore follows that even if appellee, with the charter party impliedly or actually before him, was served with written or verbal notice by appellant *alone (one* of the parties to the charter party), such notice could in nowise alter the fixed rights of appellant and the owner of the vessel or appellant's statutory right to a lien for supplies furnished—and the charter party contained no "actual restriction of authority", nor, indeed, any restriction of authority.

Again, it must be remembered, that although, as pointed out in appellant's brief, the appellee never saw the charter party in question, still it having been determined by the lower Courts that he had notice of its terms, the case must be determined precisely as though he had read the charter party before furnishing the supplies. In such case it can not be contended that any construction placed upon it by the owner and charterer would be binding upon

him but it would be construed according to its legal effect.

The District Court found that

> "while these provisions (of the charter party) require the charterer to pay all expenses incurred in operating the vessel, they do not deprive him of authority to bind the vessel therefor. Indeed, they seem rather to concede to him such authority by providing that he shall save the owners harmless from all liens against the vessel, arising, or created during the term of the charter party" (Apostles, page 123).

In view of such stipulations in the charter party, it would seem unreasonable to hold that the parties did not contemplate that a situation might arise during the course of a voyage which would necessitate the placing of a lien on the vessel. On the contrary, we think that the owner must be credited with common business prudence, and would not compel the charterer to make an agreement which in all probability would be prejudicial to its own interests. As often remarked in the books: "A ship is made to plow the seas," and if a vessel is compelled to lie idle and rot at the wharf because of needed supplies or minor repairs, the costs of which the charterers can not meet on account of insufficient funds on hand, the owner would be injured to a far greater extent than the charterers in nine cases out of ten. He has his vessel at stake and nothing to indemnify him but the uncertain capability of the charterers to respond in damages, or a chance of preventing a surety company from escaping liability in event that a bond was required

to secure the faithful performance of the charter party.

In the case of the "Oceana", supra, in which the statute in question in this case was construed the Circuit Court of Appeals, for the Second Circuit, in its opinion, speaking through Circuit Judge Ward, said:

> "Obviously the act was passed in restriction of the rights of vessel owners and in the aid of those who furnish repairs, supplies, and other necessaries. It wiped out all difference between foreign and domestic vessels, and between repairs, supplies, and other necessaries furnished in the home port, as distinguished from those furnished in foreign ports, and between such as were ordered by the master and such as were ordered by the owners. It created a presumption of law of the vessel's liability for all repairs, supplies, and other necessaries ordered by the master, managing owner, ship's husband, charterer, any person to whom the management of the vessel is intrusted at the port of supply, owner pro hac vice, and conditional vendee. There is an exception in favor of the vessel owner, relied upon by the claimant in this suit, in the case of repairs, supplies, or other necessaries ordered by a charterer or conditional vendee, who has no authority to bind the vessel, provided the repair and supply men knew, or ought with reasonable diligence to have learned, that the charter or conditional agreement of sale deprived the charterer or vendee of this authority.
>
> While it is true that an examination of the records of the custom house at this port would have disclosed the fact that the Morse Company, and not the Bermuda Company, was the owner of the steamer, knowledge of which fact would require the libelants to make further in-

quiry, we do not see any ground for holding that reasonable diligence required them to make any such search. They were entitled to a lien without giving credit to the vessel, and they were entitled to treat those intrusted with her management as authorized to order repairs, supplies, and other necessaries which would be secured by such a lien. It lay upon the claimant to show some fact or circumstance which would have put these libelants on inquiry, and it has not done so. This is the view taken by Judge Rose in The City of Milford (D. C.), 199 Fed. 956, and by the Circuit Court of Appeals for the Third Circuit in the case of The Yankee, 233 Fed. 919, 147 C. C. A. 593.

The claimant puts great stress on the decision of the Supreme Court in The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, made long before the passage of the act of 1910. It is not applicable.

In that case the least inquiry would have disclosed the fact that the company operating the steamer was a charterer bound to pay for coal; but the libelant supplied coal, not on the order of the master, but of the company, without making any inquiry whatever. If he relied for his lien upon the New York statute, we have held that it would be necessary for him to prove that he gave credit to the vessel. The Electron, 74 Fed. 689, 21 C. C. A. 12. This he could not do."

This decision clearly upholds the views expressed by the District Court and Circuit Court of Appeals in the instant case, and is not in conflict with the same as maintained on page 55 and elsewhere in appellant's brief. It will be further noted that in the "Oceana" the charter provided that the ship shall be kept clear from any liens from any cause,

and if any lien is filed or asserted, the same to be bonded against, while in the instant case the stipulation is merely that the vessel shall be *returned,* free and clear of liens (Apostles pg. 17). In neither case is a prohibition contemplated or provided for, but, in the instant case, such prohibition is so far from being contemplated that the charterer would not be in violation of charter party if, during the charter period he permitted liens to be asserted, as long as none existed at the return date. Appellee, therefore, with notice of the charter party, could find nothing therein concerning liens during the charter period and prior to return date.

In the case of "The Bud III", 250 Fed. 918, wherein the libelant alleges that the supplies were furnished upon the order of the person in possession under a contract or possession, the Court held, in construing the said Act of June 23, 1910, as follows:

> "Congress could have had but one intent in the passage of this act. It was to give a lien for supplies, etc., to the person furnishing the same, upon the vessel to which same was furnished, under the circumstances set out in the act. If such was not the intent, why specify the conditions under which the supplies, etc., were to be furnished? Theretofore the lien for supplies furnished to a vessel in her home port was dependent upon the statutes of the several states, and Congress, in the fifth section of the act, specifically supersedes all such state statutes. This action alone, even if the words of the act were doubtful, would be very persuasive of the intent to give a maritime lien for supplies

> furnished a vessel, whether in her home port or not. I have examined the cases of The St. Jago de Cuba, 9 Wheat. 409, 6 L. Ed. 122; The Sinoloa (D. C.) 209 Fed. 336, 128 C. C. A. 15, but find nothing in them adverse to this construction of the act of Congress."

As we view the situation, this Court must either overrule the holding in the "Underwriter" (supra), as was properly done in the case of the "Surprise" (supra), or must annul pro tanto the provision in the Federal Act giving to charterers, and their duly appointed agents, the presumed right to give a lien upon a vessel for necessary supplies furnished to it.

We respectfully submit that the rulings of the District Court and Circuit Court of Appeals in this case, that a provision in a charter party requiring a charterer to pay the operating expenses, is not equivalent under the recent statute to a limitation in the charter party on the authority of the charterer to bind the vessel, is a correct statement of the law and that the decree of the Circuit Court of Appeals should be affirmed.

Dated, San Francisco,
October 15, 1919.

IRA S. LILLICK,
Proctor for Appellee.

S. Hazlett Denby,
Counsel